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 1                IN THE UNITED STATES DISTRICT COURT

 2               FOR THE EASTERN DISTRICT OF TEXAS

 3                       MARSHALL DIVISION

 4   HUAWEI TECHNOLOGIES CO.      )(

 5   LTD.                         )(   CIVIL ACTION NO.

 6                                )(   2:20-CV-030-JRG

 7   VS.                          )(   MARSHALL, TEXAS

 8                                )(

 9   VERIZON COMMUNICATIONS,      )(   DECEMBER 17, 2020

10   INC., ET AL.                 )(   1:12 P.M.

11                   CLAIM CONSTRUCTION HEARING

12                      BY VIDEO CONFERENCE

13         BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

14             UNITED STATES CHIEF DISTRICT JUDGE

15

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01:12:43   1   [REPORTER'S NOTE: During the following

01:12:43   2   proceedings, there were disruptions in the audio as a

01:12:43   3   result of it being held by videoconferencing. These are

01:12:43   4   noted in the transcript.]

01:12:43   5   ***

01:12:43   6   THE COURT: Good afternoon, counsel. This is

01:12:45   7   Judge Gilstrap. We'll proceed with claim construction in

01:12:53   8   the Huawei versus Verizon, et al., matter. This is Civil

01:12:55   9   Case No. 2:20-CV-030.

01:12:58   10   Let me ask for announcements on the record. Let's

01:13:06   11   begin with the Plaintiff.

01:13:06   12   What says the Plaintiff, Huawei?

01:13:09   13   MR. LOVE: Good afternoon, Your Honor. Greg Love

01:13:11   14   for Huawei, and Plaintiff is ready to proceed.

01:13:13   15   Along with myself, I have Justin Nemunaitis, who

01:13:17   16   is pictured on camera here. He will be arguing a portion

01:13:21   17   of the claim construction, along with Hamad Hamad, Alex

01:13:27   18   Waldrop, and Seth Reich.

01:13:31   19   THE COURT: All right. And Plaintiff's ready to

01:13:33   20   proceed, Mr. Love?

01:13:35   21   MR. LOVE: Yes, Your Honor.

01:13:36   22   THE COURT: What's the announcement from

01:13:37   23   Defendants?

01:13:39   24   MR. DACUS: Good afternoon, Your Honor. Deron

01:13:41   25   Dacus on behalf of the Defendants. And here with me as

01:13:45   1   co-counsel are Charlie Verhoeven, Patrick Curran, Brian

01:13:49   2   Mack, Deepa Acharya, Brett Watkins, and Patrick Stafford.

01:13:56   3   And from Verizon, Your Honor, we have Mike Holden, Jack

01:14:02   4   Minnear, and Sanjeev Mehta, Your Honor. And we're ready to

01:14:08   5   proceed.

01:14:08   6   THE COURT: All right. Thank you, Mr. Dacus.

01:14:09   7   Counsel, let me remind you again, and those

01:14:13   8   listening in, as well, unless you're actually speaking with

01:14:16   9   the Court, please make sure all your devices, computers,

01:14:22 10   telephones, any other device remain muted, again, unless

01:14:27 11   you're speaking to the Court.

01:14:28 12   Also, I'll remind you, to facilitate the Court

01:14:31 13   interjecting questions, if you will keep at least one eye

01:14:36 14   on me while you make your presentations. If you see me

01:14:39 15   raise my hand, that means please stop, I have a question to

01:14:43 16   ask. That keeps me from talking over you and avoids any

01:14:47 17   resulting confusion in the record.

01:14:49 18   Also, I'll note that previously, on yesterday --

01:14:57 19   some time yesterday, the parties filed Document 135 on the

01:15:02 20   docket here indicating a suggested order for argument with

01:15:06 21   regard to the disputed claim terms set for construction as

01:15:11 22   a part of this Markman hearing.

01:15:12 23   I will note that subsequent to that, the Court's

01:15:16 24   received an updated and amended list and order of terms to

01:15:22 25   be argued. I don't find that's actually been filed yet,

01:15:26 1 but that's the proposed order that the Court intends to

01:15:32 2 follow, with one exception, and that is I intend -- if we

01:15:39 3 have not already reached it in the ordinary order of

01:15:42 4 things, I intend to transition 30 minutes from the end of

01:15:49 5 our allocated time today to cover the Verizon patents under

01:15:55 6 that portion of the list.

01:15:58 7   I am concerned as the way -- the way things are

01:16:01 8 presently structured that without allocating some specific

01:16:03 9 time to cover those, we may not get through the Huawei

01:16:09 10 patents and get to the Verizon patents by the end of our

01:16:11 11 time today, and I want to make sure we get some time

01:16:14 12 dedicated to the arguments concerning the disputed claim

01:16:18 13 language within the Verizon patents.

01:16:20 14   So 30 minutes from the end, I intend to transition

01:16:23 15 to the Verizon patents, irrespective of where we are on the

01:16:28 16 parties' suggested priority list, just so that you will

01:16:36 17 know.

01:16:36 18   With that, I'm prepared to begin the claim

01:16:40 19 construction process, and we'll start with data blocks,

01:16:52 20 data blocks containing data only, and data block group

01:16:56 21 containing data blocks only from the '433 patent.

01:17:02 22   Let me hear proposed argument from Verizon first,

01:17:06 23 and then I'll hear argument from Huawei second on this

01:17:12 24 term.

01:17:12 25   MS. ACHARYA: Good morning, Your Honor. Deepa

01:17:15   1   Acharya for Verizon.

01:17:16   2   I'm going to be speaking on behalf of Verizon for

01:17:19   3   the '433 patent terms and the '151 patent terms that we're

01:17:24   4   going to be discussing today.

01:17:25   5   THE COURT: All right. Counsel, please proceed.

01:17:30   6   MS. ACHARYA: Your Honor, if you -- I believe you

01:17:32   7   have our slide deck that we submitted yesterday.

01:17:34   8   THE COURT: I do.

01:17:35   9   MS. ACHARYA: And if you turn to Slide 5 in the

01:17:39   10 '433 deck that we submitted.

01:17:42   11   This slide shows what the dispute is with respect

01:17:45   12 to this term. The dispute is whether these data blocks in

01:17:50   13 the data block group should be limited to just containing

01:17:54   14 data or if they should contain other types of information,

01:17:58   15 as Huawei contends.

01:18:00   16   If you look at Slide 6, you can see that Huawei --

01:18:06   17 there's clearly a dispute because Huawei is trying to

01:18:08   18 interject other types of information that's not

01:18:10   19 contemplated for by the specification or the intrinsic

01:18:14   20 evidence.

01:18:14   21   For example, Huawei is trying to include network

01:18:17   22 monitoring information, these other types of information

01:18:21   23 that's not data.

01:18:23   24   As you can see in their brief, they're saying that

01:18:26   25 there's information, and that's in addition to customer

01:18:28 1 service data.

01:18:30 2   THE COURT: Let me ask you this, counsel. Is

01:18:32 3 there data that is not control information and is also not

01:18:36 4 service data, in your view?

01:18:40 5   MS. ACHARYA: There is data that can be

01:18:43 6 transmitted in a control block, but service data can only

01:18:48 7 be transmitted in data block.

01:18:52 8   So there's other types of information that could

01:18:56 9 be transmitted in a control block, but the information that

01:18:59 10 can be transmitted in a data block can only be the type of

01:19:02 11 data that's specified in the specification, which is

01:19:05 12 service data.

01:19:06 13   And the specification is pretty clear -- I mean,

01:19:11 14 there's this control information, and then there's this

01:19:15 15 data information that goes into these data blocks.

01:19:16 16   THE COURT: Tell me --

01:19:17 17   MS. ACHARYA: And starting --

01:19:17 18   THE COURT: Tell me what you --

01:19:20 19   MS. ACHARYA: Sorry. Go on, Your Honor.

01:19:21 20   THE COURT: Tell me what you understand service

01:19:22 21 data to comprise.

01:19:24 22   MS. ACHARYA: Sure. So if you look at Slide 15,

01:19:33 23 the specification has a definition of what service data is.

01:19:36 24 It's a type of client information that's going to be

01:19:40 25 transmitted. We're talking about voice, we're talking

01:19:42   1   about data, multi-media data, other types of services that

01:19:46   2   are the actual information that the client wants to

01:19:48   3   transmit.

01:19:48   4   And that's different from the types of control

01:19:52   5   information or other information that needs to be

01:19:54   6   transmitted for the network to be able to, for example,

01:19:58   7   understand what's being transmitted or on the receive side,

01:20:01   8   be able to decipher, decode what (audio drops).

01:20:10   9   THE COURT: We lost you, counsel. Are you there?

01:20:29 10   I'm assuming somebody pulled the plug on

01:20:36 11   Ms. Acharya and that she'll call back in. So we'll wait

01:20:40 12   and see.

01:20:51 13   MS. ACHARYA: Can everybody hear me?

01:20:53 14   THE COURT: I can hear you, Ms. Acharya.

01:20:55 15   MS. ACHARYA: I apologize for that. I had an

01:20:57 16   error on my end.

01:20:59 17   THE COURT: Go ahead.

01:20:59 18   MS. ACHARYA: So I was saying that the service

01:21:02 19   data specified by the patent -- it's the voice, data, the

01:21:07 20   types of client information that you would send

01:21:10 21   multi-media. And that's different from the information

01:21:13 22   such as control information that's needed for the network

01:21:16 23   to be able to understand what's being trans -- transmitted.

01:21:18 24   So that service data is what the patent references

01:21:20 25   when we're talking about what we're talking about, the data

01:21:22   1   that goes into these data blocks.

01:21:24   2   So the reason that Verizon wanted to include

01:21:31   3   service data in the construction is really to just make

01:21:33   4   sure that we're not trying to include other types of

01:21:36   5   information that's not contemplated for by the

01:21:38   6   specification when we're talking about the data that goes

01:21:40   7   into these data blocks.

01:21:41   8   And if Your Honor takes a look at Slide 11 --

01:21:46   9   basically, Slides 11 to 13 talk about the excerpts from the

01:21:51   10 specification that show time and time again -- almost

01:21:55   11 exclusively the specification refers to data blocks

01:21:58   12 containing data only or data block groups containing data

01:22:03   13 only.

01:22:04   14   And, actually, if you do a control find in the PDF

01:22:07   15 of the '433 patent, you will almost never see data block

01:22:12   16 without that additional text saying "containing data only."

01:22:17   17 The specification or the claims are very clear that when

01:22:20   18 we're talking about data blocks, we're talking about data

01:22:24   19 blocks that contain data only.

01:22:25   20   THE COURT: In your view, counsel, is there a

01:22:27   21 difference between control information and control

01:22:29   22 characters?

01:22:31   23   MS. ACHARYA: There is. Control characters are --

01:22:37   24 it's -- it's another kind of indicator that's being sent

01:22:40   25 with the control information. And I think it -- it tells

01:22:43 1 you the type of control information that's being sent.

01:22:47 2   These are different from the identifiers that are

01:22:49 3 in the claims, though. There's four different identifiers

01:22:51 4 in the claims, and then there's also control characters.

01:22:54 5 And that would be different from control information that's

01:22:57 6 being sent within the control blocks.

01:23:01 7   THE COURT: All right. What else do you have for

01:23:03 8 me on this term?

01:23:03 9   MS. ACHARYA: Sure. So if you turn to -- if you

01:23:10 10 turn to Slide 17, you see -- the issue that we see with

01:23:14 11 Huawei's interpretation of this term is that they're

01:23:19 12 essentially reading out the word "only data" from the

01:23:23 13 construction and from the claim.

01:23:25 14   The claims are explicit. It says: Data blocks

01:23:27 15 containing data only. Well, if you're allowed to include

01:23:30 16 other types of information, such as network monitoring

01:23:33 17 information, you're no longer sending the service data that

01:23:36 18 the -- that the patent contemplates for. So you're

01:23:39 19 essentially reading that term out, and legally, that's

01:23:41 20 inappropriate.

01:23:42 21   And if you turn to Slide 19, you'll see in the

01:23:47 22 briefing that Huawei talks about how we're trying to get a

01:23:49 23 disclaimer. And I think that's a red herring really here

01:23:52 24 because we're not saying that it's a disclaimer. I mean,

01:23:56 25 we're just reading the terms in the claim which have that

01:24:00 1 word "only" in there. We're not trying to add the word

01:24:03 2 "only." That's what's in the claims.

01:24:04 3   And we're only asking the Court to really give

01:24:08 4 credits to the terms that are actually in this claim.

01:24:16 5   And that's it from our side for this argument.

01:24:19 6   THE COURT: All right. Let me hear a response

01:24:20 7 from Huawei.

01:24:21 8   MR. NEMUNAITIS: Thank you, Your Honor. Justin

01:24:23 9 Nemunaitis for Huawei.

01:24:24 10   Your Honor asked a question: Is there a

01:24:28 11 difference between service data and some other type of

01:24:31 12 data? And I think that really gets to the issue here.

01:24:34 13   The patent draws a distinction between control

01:24:40 14 blocks and data blocks. And this is shown in Figure 1 of

01:24:43 15 the patent. A control block is something that has a

01:24:47 16 control character, and it may only contain control

01:24:51 17 characters or it may also contain some data if there's

01:24:54 18 extra space to -- to transport more data.

01:24:56 19   A data block is something that only contains data,

01:25:00 20 so the patent draws a distinction between data blocks that

01:25:03 21 only contain data, which go at the end of the encoding

01:25:08 22 block, and control blocks that are supposed to go upfront.

01:25:12 23   The problem with Verizon's proposal is that

01:25:15 24 they're not proposing a definition of any word in the

01:25:18 25 claim. They just want to insert a new word into the claim,

01:25:22 1 and it creates this -- this ambiguity because Verizon is a

01:25:25 2 service provider.

01:25:26 3   So Verizon can provide cable television or

01:25:30 4 streaming audio to one of its customers, and it sounds like

01:25:34 5 both sides agree that if Verizon is using this patent to

01:25:39 6 provide cable television or streaming audio to a customer,

01:25:42 7 that that -- that would be a way to practice the patent.

01:25:47 8   Where we get into a dispute is if Verizon is, for

01:25:50 9 example, using this technology to transport data from one

01:25:52 10 of its customers's data centers to a different data center.

01:25:57 11 Are they really providing a Verizon service at that point?

01:26:00 12   You know, our position would be all the patent

01:26:03 13 cares about is if you are using the encoding scheme as

01:26:06 14 described in the claims, and so that would still meet the

01:26:08 15 claims.

01:26:09 16   But the argument we may run into from Verizon is

01:26:12 17 we're not providing a service like streaming audio or video

01:26:16 18 or something like that, and so, therefore, we don't meet

01:26:18 19 the claims.

01:26:19 20   But the claims themselves, none of them say that

01:26:21 21 this patent is limited to only providing television or

01:26:24 22 music or something like that. It's a way of encoding data

01:26:27 23 to transport over an OTN. It's -- it's not limited to that

01:26:31 24 sort of higher level sort of issue.

01:26:34 25   The other point I would raise as to the disclaimer

01:26:39   1   issue, Verizon referred to Slide 15 as providing a

01:26:42   2   definition of service data. But on their Slide 15, all

01:26:49   3   the -- all that part of the specification says is when

01:26:53   4   transmitting service data, a communication system encodes

01:26:56   5   the service data to be transmitted through an encoding

01:26:59   6   scheme of adapted for a payload bandwidth.

01:27:03   7   That doesn't say this patent is only used when

01:27:05   8   transporting services like music or video. It just says

01:27:08   9   when you're using it in that way, you will use an encoding

01:27:12   10 scheme.

01:27:12   11   The other example discusses: With increasing

01:27:16   12 bandwidth requirements caused by the increase in people's

01:27:20   13 demand for voice, data, multi-media, and other services,

01:27:23   14 the OTN has gradually become a core platform for bearer

01:27:28   15 services of various operators.

01:27:30   16   Again, all this is saying is that an OTN is one

01:27:32   17 type of technology that can be used to provide these

01:27:34   18 services. It is not saying OTN is only used to provide

01:27:40   19 these types of services because OTN can be used for all

01:27:44   20 kinds of things. It can be used by Verizon to deliver

01:27:47   21 services, or it can be used by a company to link up its

01:27:50   22 data centers, or it can be used by Verizon to communicate

01:27:54   23 between different parts of its equipment so that it can,

01:27:57   24 you know, turn on additional services that it provides to

01:28:00   25 customers.

01:28:01   1   And so for those reasons, we believe that Verizon

01:28:03   2   has not shown that there's a reason to change the claim

01:28:06   3   language as written.

01:28:07   4   THE COURT: All right. Do you have any brief

01:28:11   5   follow-up, Ms. Acharya?

01:28:15   6   MS. ACHARYA: Just briefly, Your Honor.

01:28:16   7   Referring to Slide 15, I don't think we're

01:28:19   8   necessarily trying to limit the claims any more so than

01:28:23   9   what's set forth in the specification. We just want to

01:28:25   10   make sure that Huawei is not going to be interjecting

01:28:28   11   additional control types of information such as like they

01:28:31   12   said the network monitoring type of information. Those

01:28:34   13   types of information are not contemplated for by the patent

01:28:37   14   in terms of transmitting within the data blocks.

01:28:42   15   THE COURT: All right. Thank you, counsel.

01:28:43   16   Let's move on to the next disputed term. This

01:28:46   17   also is from the '433 patent. We'll take up next control

01:28:53   18   block buffer and data block buffer.

01:28:59   19   We'll follow the same approach. Let me hear from

01:29:02   20   Verizon first.

01:29:03   21   MS. ACHARYA: Your Honor, I'll be handling this

01:29:07   22   term as well.

01:29:09   23   The dispute here which is shown on Slide 21 of

01:29:10   24   that same slide deck is whether the data block buffer and

01:29:15   25   the control block buffer are separate buffers or whether

01:29:18   1   you can have a single buffer solution as Huawei contends.

01:29:21   2   If you look on Slide 23, we show that over and

01:29:28   3   over again, the specification is very explicit, again, in

01:29:33   4   the sense that you have a buffer that handles pure data as

01:29:37   5   set forth in the figure for 7A, and this pure buffer data

01:29:44   6   holds the data blocks that contain the data only.

01:29:48   7   So the argument is similar to what we were talking

01:29:50   8   about before in the sense that there's this clear

01:29:54   9   delineation between data and control information. And we

01:29:57 10   have a buffer here that's designated for just containing

01:30:00 11   data blocks.

01:30:00 12   And the specification is clear that when we're

01:30:03 13   putting data blocks into a buffer, we're not just putting

01:30:06 14   it into any buffer, we're putting it into a buffer

01:30:09 15   containing data blocks only.

01:30:13 16   If you turn to Slide 24, you can see that there's

01:30:16 17   a second buffer, 7B -- Figure 7B in the patent. And this

01:30:22 18   is where the specification says you place control blocks

01:30:24 19   into this control block buffer. And as you can see from

01:30:31 20   Figure 7A on the previous side and 7B on this side, there's

01:30:31 21   a clear delineation around these buffers. There's a

01:30:35 22   specific line around these buffers to show that they're

01:30:38 23   separate.

01:30:39 24   And if you look on the left-hand side of this

01:30:41 25   figure, they also have row numbers. You can see from 1 to

01:30:44   1   16.   Each of them have separate row numbers going from 1 to

01:30:48   2   16.

01:30:48   3   We don't see a situation where the data block

01:30:53   4   buffer starts from 1 to 16 and then the control block

01:30:56   5   buffer starts on 17 to show that they're continuous --

01:31:02   6   tiguous.   Instead, it shows that they're separate buffers.

01:31:04   7   And, again, if you look at the claims on Slide 25,

01:31:07   8   the claims show that you're putting the control blocks into

01:31:13   9   a control block buffer, or you're putting the data blocks

01:31:16   10   into a data block buffer.   The two are separate.

01:31:21   11   Turning to Slide 26, you can see what the issue is

01:31:24   12   with respect to Huawei's construction.   The claims are

01:31:27   13   specific.   They say that this -- this buffer, this data

01:31:33   14   block buffer contains data blocks only.   It only contains

01:31:36   15   the data blocks, and that's what the specification teaches

01:31:38   16   you, as well.

01:31:39   17   Well, if you're allowed to include control

01:31:43   18   information or this one buffer solution as Huawei proposes,

01:31:46   19   you no longer have a buffer that contains just data, you're

01:31:49   20   going to have a buffer that contains control information,

01:31:53   21   and that violates the claim.

01:31:54   22   The claim says that you have this data buffer that

01:31:57   23   contains data, and you have this control buffer that

01:31:59   24   contains control.   And it, again, uses the word "only" in

01:32:03   25   the sense that you have this buffer that can only contain

01:32:06   1   data blocks.

01:32:07   2   So under Huawei's proposed interpretation of this

01:32:10   3   claim, you would then have this buffer that contains

01:32:13   4   control information which would violate the plain language

01:32:16   5   of this claim, in fact.

01:32:17   6   And if you look at the prosecution history, we

01:32:21   7   believe that this supports our construction, as well. On

01:32:26   8   Slide 27, you can see here that the applicants added the

01:32:30   9   term "data block" in front of "buffer" at the very end of

01:32:33   10 that excerpt that we have there.

01:32:34   11   And the reason for that is to show that we're not

01:32:38   12 talking about just any buffer, we're not talking about the

01:32:41   13 buffer that was referenced right before that section, which

01:32:44   14 is the control block buffer, we're talking about a separate

01:32:49   15 buffer, which is the data block buffer.

01:32:51   16   And Huawei raises the point that the examiner --

01:32:53   17 or the applicant eliminated the word "containing data only

01:32:58   18 blocks" at the end of that claim. Well, the reason for

01:33:01   19 that is that same language is included above when it says

01:33:04   20 data blocks containing data only.

01:33:06   21   Since this buffer only contains data blocks, it

01:33:09   22 would be redundant to repeat "containing data only." But

01:33:16   23 the fact that the applicant added the word "data block"

01:33:16   24 makes it clear that they were talking about something

01:33:21   25 different than what was the control buffer from before.

01:33:22 1   THE COURT: Let me ask you this. In your proposed

01:33:25 2 construction of data block buffer, you propose: Dedicated

01:33:32 3 buffer for only pure data.

01:33:33 4   You want to tell me what pure data means?

01:33:36 5   MS. ACHARYA: Pure data comes from the

01:33:39 6 specification. If you look on Slide 23, that -- that's

01:33:43 7 what the specification uses to reference the fact that

01:33:45 8 we're not talking about control information. This is just

01:33:48 9 another example of how the specification is trying to make

01:33:51 10 it extremely clear that we're talking about a buffer that

01:33:55 11 only contains data, which is why I believe the

01:33:58 12 specification uses the word "pure," and that's why we

01:34:03 13 included it in our -- in our (audio drops).

01:34:06 14   THE COURT: All right.

01:34:07 15   MS. ACHARYA: And that's it, Your Honor -- that's

01:34:09 16 it from my end.

01:34:10 17   THE COURT: Let me hear from Huawei then.

01:34:12 18   MR. NEMUNAITIS: Thank you, Your Honor. Justin

01:34:14 19 Nemunaitis for Huawei.

01:34:16 20   THE COURT: Go ahead.

01:34:17 21   MR. NEMUNAITIS: As to the last question -- can

01:34:21 22 Your Honor hear me?

01:34:22 23   THE COURT: I can. I said: Go ahead.

01:34:25 24   MR. NEMUNAITIS: I'm sorry. I lost the video

01:34:27 25 on -- on this, but I'll keep talking.

01:34:29   1   As to the last question about pure data, that

01:34:34   2   phrase is in Figure 7 of the patent where it refers to the

01:34:39   3   pure data block buffer. If you look at that figure, what

01:34:43   4   it is referring to is the coding blocks that have only data

01:34:50   5   blocks which is in contrast to the coding blocks that have

01:34:54   6   a mix of control blocks and data blocks.

01:34:56   7   So what it's really saying there it's a buffer

01:34:59   8   containing data blocks that -- that just have the data.

01:35:01   9   As to the -- the broader issue of (audio drops)

01:35:08 10   versus data block buffer, the claims do not say that the

01:35:12 11   control block buffer contains control blocks only. They

01:35:15 12   don't say that the data block buffer contains data blocks

01:35:19 13   only.

01:35:20 14   What Verizon is trying to do is insert a new

01:35:23 15   limitation that says you have to have a control block

01:35:27 16   buffer that includes control blocks, and you have to have a

01:35:32 17   data block buffer that includes data blocks, and you have

01:35:35 18   to show that neither one of those buffers contains anything

01:35:39 19   else.

01:35:39 20   But that extra step, that extra negative

01:35:42 21   limitation that they want to stick in, that is not present

01:35:45 22   in the claim language. And that was the language that was

01:35:47 23   removed during prosecution. So there's no reason to insert

01:35:52 24   here as a matter of claim construction.

01:35:53 25   I think the closest case on point for this issue

01:35:57   1   is the Linear Tech. v. ITC case. That's 566 F.3d 1049.

01:36:05   2   And I wanted to point that out to the Court because the

01:36:08   3   issue there was that the patent -- that was a voltage

01:36:13   4   regulator. So this would be some device that controls the

01:36:15   5   electricity going into something else like a laptop. And

01:36:18   6   it had two modes.

01:36:21   7   In Mode 1, there was a first circuit that

01:36:24   8   controlled the voltage. In Mode 2, which was the sleep

01:36:27   9   mode, there was a second circuit that controlled the

01:36:30 10   voltage going to the device.

01:36:31 11   The ALJ in that case found that because the claim

01:36:35 12   recited this first circuit with the first function and the

01:36:40 13   second circuit with the second function, the claim required

01:36:42 14   two separate and distinct circuits.

01:36:45 15   The Federal Circuit said: No, we don't impose a

01:36:47 16   negative limitation just because the claim recites

01:36:50 17   different limitations for different functions. And so it

01:36:53 18   found that there could be overlapping circuitry that could

01:36:57 19   be identified to show infringement of that claim.

01:36:59 20   And I think we have a similar issue here where

01:37:02 21   because there's no negative limitation in the claim,

01:37:05 22   because there's no clear and unambiguous disclaimer in the

01:37:09 23   specification, there's no reason to insert that -- that

01:37:13 24   limitation into the claim.

01:37:14 25   And one last point. Ms. Acharya did go through

01:37:18   1   some examples in the specification talking about separate

01:37:21   2   buffers. But, again, those are just examples. There is no

01:37:24   3   statement that Verizon has identified saying that the

01:37:28   4   claims must be limited to these particular examples.

01:37:30   5   THE COURT: Let me ask you this. Is there a

01:37:37   6   description somewhere of one buffer that stores both data

01:37:41   7   and control blocks?

01:37:43   8   MR. NEMUNAITIS: The way those terms are used

01:37:47   9   generally in the patent, it is left ambiguous or agnostic

01:37:51 10   to the type of implementation. I -- I don't believe

01:37:54 11   there's a specific example that specifically recommends

01:37:59 12   doing that.

01:38:00 13   But, again, the fact that -- that a patent focuses

01:38:03 14   on, you know, one particular example is not a reason to

01:38:06 15   limit the claims to just that example.

01:38:07 16   THE COURT: All right. Anything else,

01:38:12 17   Mr. Nemunaitis?

01:38:13 18   MR. NEMUNAITIS: No, Your Honor.

01:38:15 19   THE COURT: Any follow-up, Ms. Acharya -- Acharya?

01:38:24 20   MS. ACHARYA: Very briefly.

01:38:25 21   I just wanted to point out that the cases that

01:38:27 22   counsel identified in the briefing and today, they're

01:38:29 23   different in the sense that they don't have the word "only"

01:38:32 24   in the claims and the specification. The difference here

01:38:34 25   is that the specification and claims specifically delineate

01:38:37 1 two separate structures. And in these other cases, the

01:38:41 2 specifications and the claim leave open the ability for

01:38:45 3 these two separate structures to be one structure in (audio

01:38:50 4 drops).

01:38:50 5   But because our claims and our specification use

01:38:53 6 the word "only," it makes it very hard to find a buffer

01:38:58 7 that contains data blocks -- that only contains data blocks

01:39:04 8 if it had other types of information such as control

01:39:08 9 information. That buffer just would not follow the claim

01:39:11 10 in that sense.

01:39:11 11   And then to your last point, Your Honor, about

01:39:15 12 there being an example of a one-buffer solution, well,

01:39:19 13 there isn't a one-buffer solution in the specification.

01:39:21 14 There's no example of one. Every time we're talking about

01:39:24 15 a buffer, it's very explicit that we're talking about a

01:39:29 16 data buffer that contains data blocks and a control buffer

01:39:34 17 that contains control blocks.

01:39:36 18   THE COURT: All right. Let me ask everybody on

01:39:37 19 the connection that we have to make sure your devices are

01:39:43 20 muted. We're getting a steady clicking audio-wise on my

01:39:49 21 end that makes it difficult to follow the oral arguments.

01:39:53 22 I'm still getting it. Please double-check your devices,

01:39:56 23 make sure everybody is on mute unless you're speaking to

01:39:59 24 the Court.

01:39:59 25   All right. Let's go on to the '151 patent, and

01:40:07   1   we'll begin with mapping the single low-rate traffic signal

01:40:14   2   to the single low-rate traffic OPU is performed using a

01:40:20   3   general framing procedure or other adaptation protocols.

01:40:25   4   Again, Huawei is proposing no construction

01:40:30   5   necessary, which seems to be their approach throughout. So

01:40:32   6   let me start with Verizon that gives a proposed specific

01:40:35   7   construction, and let me hear their arguments in regard to

01:40:38   8   their construction. And then I'll hear from Huawei in

01:40:41   9   response.

01:40:41   10   So I'll start with Verizon.

01:40:45   11   MS. ACHARYA: Your Honor, I'll be handling this

01:40:47   12   term, as well.

01:40:48   13   And if you turn to the '151 slide deck that we

01:40:52   14   sent you at Slide 5, we set forth the dispute that's really

01:40:56   15   here. And the dispute is whether the claim is limited to

01:41:02   16   GFP mapping and the two variants of that mapping, which is

01:41:06   17   GFP-T and GFP-F, or whether it can include any type of

01:41:10   18   adaptation protocol.

01:41:12   19   If you turn to Slide 7, and Slide 7 to 9 shows the

01:41:20   20   claim specification, and it demonstrates the fact that the

01:41:26   21   specification over and over again only refers to GFP map.

01:41:30   22   There is no teaching of any other type of mapping in the

01:41:33   23   specification, and it talks about GFP mapping and the two

01:41:37   24   variants that are described on Slide 9, GFP-F and GFP-T.

01:41:41   25   But other than those two type of mapping, the

01:41:45 1 specification does not explain how you would use any other

01:41:48 2 type of mapping with the invention disclosed in the '151

01:41:53 3 patent.

01:41:53 4   THE COURT: That being the case, why couldn't

01:41:57 5 Huawei argue that what in effect you're attempting to do is

01:42:00 6 import a limitation from the specification into the claim

01:42:03 7 language?

01:42:03 8   MS. ACHARYA: So what we would say is if you look

01:42:09 9 at the prosecution history, the examiner actually added an

01:42:15 10 amendment at the end of the very lengthy prosecution

01:42:19 11 history that followed with this patent. And to put this

01:42:22 12 patent in allowance for issuance, the patent examiner

01:42:29 13 required that dependent (audio drops) be added to the

01:42:33 14 independent claim.

01:42:33 15   The original claim -- if you look on Slide 10 --

01:42:36 16 already had the word "mapping" in there. In order to do

01:42:40 17 mapping, you have to use an adaptation protocol. There's

01:42:44 18 no other way to do mapping. You have to use this

01:42:46 19 adaptation protocol.

01:42:48 20   So as the claim was originally drafted, it would

01:42:50 21 have implicitly required the use of an adaptation protocol.

01:42:56 22 However, the examiner required that this dependent claim be

01:42:59 23 tacked on to the independent claim to put it in (audio

01:43:03 24 drops). And what it did is it limited what those

01:43:07 25 adaptation protocols could be. It said that it had to be

01:43:10   1   used using a general framing mapping procedure.

01:43:12   2   And the reason that other adaptation protocols

01:43:16   3   can't just be any other adaptation protocol is because

01:43:20   4   that's what the original claim said. By including the word

01:43:25   5   "mapping," it effectively allowed for any other adaptation

01:43:30   6   protocol.

01:43:30   7   But the examiner said: No, that was not okay.

01:43:32   8   We're going to add in this amendment to limit the scope of

01:43:35   9   what that claim is.

01:43:37 10   THE COURT: All right.

01:43:38 11   MS. ACHARYA: And another reason why -- oh, sorry,

01:43:42 12   Your Honor. Did you have a question?

01:43:43 13   THE COURT: Let me pause for a minute. I'm

01:43:43 14   getting a message from my IT people that tells me they

01:43:46 15   believe that the clicking noise we're continuing to hear is

01:43:49 16   coming from Mr. Barkan on the line ending with 1803.

01:43:54 17   So I might ask Mr. Barkan to drop off and dial

01:43:59 18   back in. Maybe we can avoid that --

01:44:00 19   MR. BARKAN: Yes, I will do that, Your Honor.

01:44:02 20   THE COURT: Thank you.

01:44:02 21   MR. BARKAN: I will do that. I'm sorry.

01:44:04 22   THE COURT: Sorry for the interruption.

01:44:05 23   Go ahead, Ms. Acharya.

01:44:06 24   MS. ACHARYA: No problem.

01:44:10 25   The problem with having just the term "other

01:44:14   1   adaptation protocols" in the claim is that it would render

01:44:18   2   the claim indefinite.

01:44:19   3   If you look on Slide 11, you can see our expert

01:44:22   4   said that there are thousands of different adaptation

01:44:25   5   protocols. And even within the G.709 standard, our expert

01:44:32   6   looked at all the adaptation protocols, even within the

01:44:32   7   scope of the standard that's at issue here, which is the

01:44:36   8   G.709 standard. There's 30 different adaptation protocols

01:44:42   9   even within that G.709 standard.

01:44:42   10   But these adaptation protocols aren't a

01:44:46   11 plug-and-play situation. We can't just pick and choose one

01:44:48   12 adaptation protocol to just use with this invention. Each

01:44:53   13 adaptation protocol is very specific to the application

01:44:55   14 that it's meant for.

01:44:56   15   So we have GFP that was set forth in this

01:45:03   16 specification, and that's because GFP was specifically

01:45:06   17 designed and used for this mapping of low-rate traffic.

01:45:09   18   If you tried to include another type of adaptation

01:45:12   19 protocol, you potentially have to change the structure --

01:45:15   20 you have to change the infrastructure. You can't just use

01:45:18   21 another adaptation protocol without changing the

01:45:22   22 transmission steps that need to occur. It's all very

01:45:25   23 application-specific.

01:45:28   24   And if you look on Slide 12, procedurally, what

01:45:32   25 happened in this case is our expert set forth in his

01:45:36   1   declaration, and then Huawei's expert got to respond to

01:45:39   2   that declaration after. Our expert, as you can see at the

01:45:43   3   bottom of Slide 12, stated, you know, if we were going to

01:45:46   4   use another type of adaptation protocol such as the GMP

01:45:52   5   protocol, well, you wouldn't be able to just put GMP into

01:45:56   6   what was set forth in the '151 patent. You would have to

01:45:59   7   change the structure. You would have to make modifications

01:46:01   8   to the transmission steps. It's not as simple as just

01:46:05   9   using another protocol.

01:46:06   10   And Huawei's expert didn't really respond to that.

01:46:09   11   His only response is: Well, the 2009 standard had other

01:46:14   12   mapping techniques, such as the GMP, but he didn't explain

01:46:18   13   how he would use GMP within the '151 patent. And as our

01:46:23   14   expert explained, you just can't do it.

01:46:24   15   So the problem with having other adaptation

01:46:31   16   protocols added to the end of this claim is that if it's

01:46:32   17   not bound by what's set forth in the specification, it

01:46:35   18   leads to a limitless number of -- numbers of mapping

01:46:39   19   protocols that could be used which won't work with this

01:46:43   20   claim or the specification which will render the claim

01:46:46   21   indefinite.

01:46:46   22   THE COURT: So let me make sure I understand your

01:46:49   23   position.

01:46:49   24   You're telling me that it's not possible to map

01:46:54   25   except by using an adaptation protocol?

01:46:56   1   MS. ACHARYA: Correct, Your Honor. There's no

01:46:57   2   other way to map than to use an adaptation protocol, and

01:47:01   3   that's what the original claim had set forth.

01:47:03   4   THE COURT: All right. Let me hear a response

01:47:06   5   from Huawei, please.

01:47:07   6   MR. NEMUNAITIS: Thank you, Your Honor. Justin

01:47:13   7   Nemunaitis for Huawei.

01:47:13   8   So the dispute here is as to this claim language,

01:47:22   9   GFP or other adaptation protocols. Verizon is not taking

01:47:29   10 the position that the plain meaning of that language is

01:47:34   11 that it means GFP or no other adaptation protocols, but

01:47:37   12 that is the claim scope that they're advocating for. And

01:47:41   13 that's not an appropriate interpretation of this claim

01:47:43   14 language.

01:47:43   15   The inventors were very clear when they drafted

01:47:49   16 the specification. They provided a number of examples

01:47:51   17 where GFP was used, but then they say in Column 11: The

01:47:56   18 above GFP encapsulating and map -- mapping method may be

01:48:01   19 that of other feasible adaptation protocols encapsulating

01:48:01   20 formats and the corresponding GFP mapping module being

01:48:10   21 replaced by the mapping modules of other adaptation

01:48:14   22 protocols.

01:48:15   23   So there was clearly an intent to cover

01:48:18   24 embodiments that do not use GFP. The question is: If you

01:48:23   25 practice every limitation of the claims, is it met? And

01:48:28 1 there's no requirement that GFP be used to meet all those

01:48:31 2 other limitations.

01:48:32 3   As to the prosecution disclaimer argument, the --

01:48:40 4 the back story there is that before the notice of

01:48:45 5 allowance, the examiner and the applicant conducted an

01:48:51 6 interview, and then the examiner proposed an amendment to

01:48:54 7 the claims. The examiner proposed two amendments to the

01:48:56 8 claims, and those are shown in Slide 10 of Verizon's

01:49:00 9 presentation.

01:49:01 10   One amendment was to include this new limitation

01:49:01 11 requiring a bit rate of 1.238.

01:49:13 12   The other additional limitation was this -- this

01:49:16 13 statement about the mapping the low-rate traffic signal

01:49:19 14 using GFP or other adaptation protocols.

01:49:21 15   And if you look at the way that amendment is

01:49:24 16 shown, the examiner actually put in bold and underlined the

01:49:28 17 bit rate limitation and just put in underline the -- the

01:49:32 18 GFP or other adaptation protocols (beeping).

01:49:36 19   When you look at the examiner's notice of

01:49:41 20 allowance -- and this is in our Slide 18, but I can just

01:49:44 21 read it to the Court -- what the examiner says is: The

01:49:50 22 prior art including the cited prior art in the IDS does not

01:49:54 23 disclose at least the specific limitation for the payload

01:49:57 24 for OPU having a bit rate of 1,23 -- it reads out the rest

01:50:02 25 of the numbers -- or having a size of 4 x 3,824.

01:50:08   1   And then it goes on to cite the specific numbers

01:50:11   2   of these bit rates. Nowhere in there does the examiner say

01:50:16   3   that the notice of allowance is based on some requirement

01:50:19   4   of GFP.

01:50:20   5   Now, the standard for prosecution disclaimer is

01:50:22   6   very high. There must be clear and unambiguous disclaimer.

01:50:27   7   In this case, the language itself that was added

01:50:29   8   does not say you need to use GFP and GFP only. It tracks

01:50:35   9   the language of the specification, which says you need to

01:50:37 10   use GFP, or you can use other adaptation protocols.

01:50:41 11   So the -- the claim language itself can't

01:50:43 12   establish that disclaimer.

01:50:45 13   When you look at the notice of allowance, that

01:50:47 14   cannot establish the disclaimer because it doesn't mention

01:50:50 15   GFP at all. So what we're left with is claim language

01:50:53 16   which on its face not even Verizon is arguing is limited to

01:50:57 17   GFP, and no clear disclaimer in either the prosecution

01:51:01 18   history or the specification, and so there's no reason for

01:51:04 19   a construction at that point.

01:51:06 20   THE COURT: All right. Anything further on this

01:51:08 21   term?

01:51:10 22   MS. ACHARYA: Just briefly, Your Honor. I just

01:51:14 23   want to point out the fact that, you know, even if the

01:51:17 24   inventor had wanted to include other adaptation protocols

01:51:19 25   as set forth in the specification that counsel just

01:51:22 1 referenced, that doesn't necessarily make the claim valid.

01:51:26 2 We still have to look at the canons of claim construction

01:51:28 3 to see if the claim would be indefinite as drafted by the

01:51:34 4 inventor.

01:51:34 5   And as you can see, the examiner made amendments.

01:51:36 6 They didn't -- he didn't just include the bit rate. He

01:51:39 7 also included the additional limitation regarding the

01:51:42 8 mapping in this case.

01:51:44 9   So the examiner knew that even if that inventor

01:51:47 10 had wanted to include just any other adaptation protocol,

01:51:51 11 that wouldn't have been sufficient to put this claim in

01:51:53 12 allowance.

01:51:55 13   THE COURT: All right. Thank you, counsel.

01:51:57 14   Let's move on to the next disputed term, which

01:52:01 15 appears to be "rate rank," regarding the '151 patent,

01:52:08 16 Claims 1 and 6.

01:52:09 17   Again, Huawei's proposal is no construction

01:52:12 18 necessary. And Verizon's given a specific proposed

01:52:17 19 construction instruction. So I'll ask Verizon to address

01:52:20 20 this first, and then I'll hear a response from Huawei.

01:52:23 21   MS. ACHARYA: Your Honor, if you could turn to

01:52:29 22 Slide 18 in our deck, it shows you what the dispute is in

01:52:35 23 this situation. With respect to this term, the dispute is

01:52:39 24 whether rate rank can cover traffic rates known at the time

01:52:42 25 of the '151 patent's filing or if it includes all future

01:52:47   1   definitions of rate rank, such as all future and new

01:52:52   2   traffic rates that were contemplated for by the G.709

01:52:56   3   standard that weren't in existence at the time of the '151

01:53:01   4   patent filing.

01:53:02   5   THE COURT: Is this -- this is the after arising

01:53:02   6   technology dispute that seems to be replete through most of

01:53:05   7   what we have today, correct?

01:53:06   8   MS. ACHARYA: Correct. And this -- this issue

01:53:08   9   comes up in a couple of different patents, but I believe

01:53:11 10   we're only going to be discussing it today in argument with

01:53:14 11   respect to the '151 patent.

01:53:16 12   THE COURT: Well, I've seen it in several places

01:53:18 13   in preparing for today, but we may have narrowed it down.

01:53:21 14   Go ahead.

01:53:22 15   MS. ACHARYA: Correct. Correct. It is in several

01:53:24 16   patents.

01:53:24 17   If you look at Slide 19, you can see the parties

01:53:30 18   agree that rate rank needs to be defined by the G.709

01:53:34 19   standard. It only really has a definition with respect to

01:53:37 20   that standard, and that's not in dispute.

01:53:39 21   The dispute, though, is whether we're going to

01:53:41 22   look at the traffic rates that define that rate rank at the

01:53:46 23   time of the invention or all future traffic rates.

01:53:49 24   The canons of claim construction dictate that when

01:53:51 25   you're looking at claim construction, you look at what was

01:53:55   1   known at the time of the filing. And at the time of the

01:53:57   2   filing in this case, the standard defined a set of traffic

01:54:00   3   rates that encompassed rate rank.

01:54:04   4   Our second case here, the Promethean case, was

01:54:10   5   also a standards case which I believe Your Honor issued.

01:54:13   6   And in that case -- that case is very similar to the case

01:54:16   7   here. In that case, there was a standard as of the

01:54:19   8   effective filing date which defined a set of materials as

01:54:23   9   Class A materials. Thereafter, there were various versions

01:54:26   10 of the standard that had different materials that set --

01:54:30   11 that were set forth in Class A.

01:54:33   12   But because that invention was specific to the

01:54:35   13 materials that were set forth in Class A at that time, this

01:54:40   14 Court said that the materials that were defined as Class A

01:54:44   15 were going to be defined at the time of the filing.

01:54:47   16   And that's exactly the situation that we have

01:54:49   17 here. We have a set of rate ranks that were defined at the

01:54:53   18 time -- time of filing, and we believe that those are the

01:54:57   19 rate ranks that should be applied to the definition here.

01:54:59   20   If you look on Slide 20, you'll see this issue.

01:55:04   21 At the time of filing, the G.709 standard set forth a

01:55:08   22 limited number of traffic rates, and that was associated

01:55:12   23 with, for example, k=0, 1, 2, 3, and that was for traffic

01:55:18   24 rates under 2.5 gigabits, 2.5 gigabits per second, 10

01:55:22   25 gigabits per second, and 40 gigabits per second.

01:55:25   1   At the bottom of this slide, you can see Huawei's

01:55:28   2   opening brief, and it will show you what the future

01:55:30   3   versions of the G.709 standard now include for rate rank.

01:55:34   4   There are these new traffic rates that have now been part

01:55:37   5   of the standard, such as ODU-Flex. That's just one

01:55:42   6   example.

01:55:43   7   Well, ODU-Flex, if you -- if you say that future

01:55:45   8   versions of the standard can be included in the patent,

01:55:48   9   well, ODU-Flex is just a completely different type of

01:55:52   10 technology. It's not even just a new traffic rate. It's

01:55:55   11 actually a way to allow client rates that are separate from

01:56:00   12 rates defined by the OTN to be able to transmit those

01:56:03   13 traffic rates on the OTN. It created kind of a hybrid ODU

01:56:06   14 that handles these client signals.

01:56:09   15   Well, in order to be able to handle this, you need

01:56:13   16 different structure. You need different experiments to be

01:56:17   17 put into place, different types of transmission steps.

01:56:21   18 None of that is defined for in the '151 patent.

01:56:24   19   The '151 patent, the structure that's set forth in

01:56:26   20 there would not be able to use these new traffic rates that

01:56:30   21 are set forth here, the structure that's defined in the

01:56:33   22 specification.

01:56:33   23   So that's really the issue here is you can't just

01:56:36   24 put in these new traffic rates. This isn't a generic term

01:56:41   25 that we're trying to add in. These are very specific

01:56:44 1 traffic rates that have specific structures that are

01:56:47 2 required in order to implement.

01:56:48 3   And, Your Honor, Huawei has a number of cases

01:56:55 4 cited in their briefs, but the differentiating factor

01:57:00 5 between what's cited in their briefs and what's at issue

01:57:03 6 here in, for example, the Promethius -- Promethean case

01:57:05 7 that this Court issued is that in those cases, the terms

01:57:10 8 that were at issue in dispute were more generic terms, if

01:57:14 9 we're talking about a signal or a mixer.

01:57:16 10   Here we're talking about something very specific

01:57:18 11 where that definition has expanded over time where the new

01:57:23 12 traffic rates that are set forth in that definition no

01:57:26 13 longer can be implicated or can be used within the

01:57:31 14 infrastructure set forth within the '151 patent.

01:57:34 15   THE COURT: All right. Anything further?

01:57:36 16   MS. ACHARYA: Nothing further, Your Honor.

01:57:39 17   THE COURT: Let me hear a response from Huawei,

01:57:42 18 please.

01:57:42 19   MR. NEMUNAITIS: This dispute really comes down to

01:57:49 20 Verizon's effort to -- to create tension between these two

01:57:52 21 principles of -- of patent law.

01:57:54 22   One is that claims are generally able to cover

01:57:56 23 after arising technology if the language is broad enough,

01:58:01 24 the other being that the language of the claim has the

01:58:05 25 meaning it had when the patent was filed.

01:58:06 1   I think these two principles generally are not in

01:58:09 2   conflict. The reason why is -- you know, think about a

01:58:12 3   patent that contains the word "processor." If that patent

01:58:16 4   is a hundred years old, it -- it's going to have a

01:58:18 5   different meaning, that word, as compared to a patent that

01:58:21 6   was filed today.

01:58:22 7   And so that might be a scenario where the

01:58:26 8   construction that applies to the hundred-year-old patent is

01:58:28 9   going to be different from the construction that applies to

01:58:32 10 a 2020 patent.

01:58:32 11   But if you have a patent that's 20 years old that

01:58:37 12 contains the word "processor," that doesn't mean that the

01:58:42 13 word "processor" has changed so much in the past 20 years

01:58:46 14 that you would need a different construction. It may be

01:58:49 15 that in the year 2000, the best processor on the market was

01:58:53 16 a Pentium 4, but that doesn't mean that you need to

01:58:57 17 construe that term "processor" to mean a CPU that has the

01:58:59 18 power of a Pentium 4 but nothing faster.

01:59:02 19   But that's what Verizon is trying to do in this

01:59:04 20 case. And it's not the case that when Intel comes out with

01:59:09 21 a Pentium 5, we all need to go revise all the dictionaries

01:59:13 22 and say, okay, there's a new meaning of the word

01:59:17 23 "processor." It's just that the set of things that can

01:59:20 24 infringe a claim or that can meet that particular

01:59:22 25 limitation has grown as technology develops. And it's a

01:59:24   1   basic principle of patent law that if your claims are

01:59:28   2   drafted broadly enough, you can encompass claim scope over

01:59:32   3   those new changes in technology.

01:59:34   4   As to this term "rate rank," this is not a G.709

01:59:45   5   specific word. I would refer Your Honor to a few

01:59:48   6   statements in the specification.

01:59:52   7   In Column 5, Line 49, it refers to the GE or FC

01:59:59   8   traffic signals are in the rate of 1G rank. In Column 6,

02:00:03   9   there's a reference to the rank of FC and FE ranks.

02:00:07   10   The reason I mention that is because as this term

02:00:10   11 is used in the patent, it just refers to an approximate

02:00:17   12 value of the bit rate of a signal.

02:00:19   13   So if data being met is transferred at 1.114 or

02:00:25   14 73, you know, or some number, everyone knows that it's

02:00:27   15 easier to refer to it as gigabit ethernet. And so that

02:00:30   16 is -- that's the rate rank of the signal. And you can use

02:00:32   17 that term to refer to OTN signals, G.709 signals, or -- or

02:00:37   18 other types of signals. It's just an easier way to talk

02:00:41   19 about these things.

02:00:41   20   THE COURT: Let me ask you this, counsel.

02:00:43   21 Ms. Acharya told me that the parties agree that rank --

02:00:48   22 rate rank is defined in the G.709 standard. Do you differ

02:00:54   23 with that in light of what you just told me, or do you

02:00:58   24 agree with that?

02:00:58   25   MR. NEMUNAITIS: I differ with that, Your Honor.

02:01:00   1   The -- the term "rate rank" is a more general

02:01:03   2   term. I would agree that the G.709 standard specifies

02:01:07   3   certain rate ranks that can be used, and that has changed

02:01:10   4   over time. But that's different from saying that the

02:01:12   5   standard defines the phrase "rate rank."

02:01:17   6   I go back to my processor example. The standard

02:01:20   7   doesn't define what a processor is, or, you know, Intel

02:01:23   8   doesn't define what a processor is, but it may make, you

02:01:27   9   know, a certain set of devices that fit that definition.

02:01:30   10   THE COURT: All right. What else?

02:01:34   11   MR. NEMUNAITIS: I would just like to address the

02:01:36   12   caselaw.

02:01:37   13   The -- the -- the closest case on point is a

02:01:41   14   Federal Circuit case, SuperGuide, where the term at issue

02:01:44   15   was "regularly received television signal." At the time

02:01:48   16   that patent was filed, the standard for transmitting

02:01:53   17   television signals required an analog signal. After the

02:01:56   18   patent was filed, then digital television signal standard

02:01:59   19   was developed. And the Federal Circuit said that it was

02:02:04   20   appropriate for that term to encompass these new digital

02:02:08   21   television signals even though they did not exist at the

02:02:12   22   time the patent was filed.

02:02:12   23   In the Celltrace case, the Court reached a similar

02:02:12   24   law in which it was referred -- they used the phrase

02:02:19   25   GSM-compatible cell phone. And there's other cases, as

02:02:20   1   well.

02:02:21   2   The one case that Verizon cites to support their

02:02:24   3   position is the Promethean case. This was a Judge Payne

02:02:29   4   case. And I would really like to go into the details of

02:02:31   5   that case just a little bit because it is a very different

02:02:34   6   scenario. It really was not dealing with the after-arising

02:02:37   7   technology issue that we have here.

02:02:38   8   In that case, there was a standardized test for

02:02:43   9   measuring the thermal resistance of material, and whether

02:02:47 10   or not you passed the test decided whether or not you get

02:02:50 11   to declare your material Class A. The inventor in that

02:02:54 12   case found that the test was really not very good for a

02:02:58 13   certain type of material because it allowed the test to be

02:03:02 14   conducted with this wire mesh support, and that could

02:03:05 15   create misleading results.

02:03:07 16   So what -- what he proposed in that case was I've

02:03:10 17   come up with this new material that can achieve Class A

02:03:15 18   certification without using the wire mesh. And so he

02:03:18 19   developed this new material.

02:03:19 20   After the patent was filed, other people in the

02:03:24 21   industry recognized we've got this problem with the wire

02:03:27 22   mesh. They revised the standard to prohibit people from

02:03:30 23   using that wire mesh.

02:03:32 24   The dispute there was that the claims referred to

02:03:35 25   the standard. And the Defendant was trying to say, well,

02:03:38   1   look, these claims refer to the standard. That means they

02:03:42   2   need to go back and encompass all the prior art that used

02:03:46   3   this wire mesh.

02:03:48   4   The Court said, no, that defeats the whole purpose

02:03:51   5   of this patent. The whole purpose of the patent was

02:03:53   6   getting rid of the wire mesh, and so I'm not going to

02:03:56   7   change the claims to cover the prior art. I'm going to

02:03:59   8   keep them focused on what the invention is, which is

02:04:02   9   getting rid of this wire mesh.

02:04:05   10   And so the Court's construction there specifically

02:04:07   11   said that this material -- the term at issue covers a

02:04:12   12   material that passes this test without the wire mesh.

02:04:15   13   There's no indication that the parties briefed the

02:04:19   14   SuperGuide issue or after-arising technology issue. The

02:04:22   15   Court didn't cite that case. And so I really don't think

02:04:25   16   that's a sound example to look to when -- when analyzing

02:04:30   17   the issue here in this case.

02:04:32   18   THE COURT: All right. What else?

02:04:32   19   MR. NEMUNAITIS: Your Honor --

02:04:39   20   MS. ACHARYA: Your Honor, if I could -- sorry, go

02:04:41   21   on, Justin.

02:04:42   22   MR. NEMUNAITIS: Unless Your Honor has further

02:04:44   23   questions, I don't have any.

02:04:45   24   THE COURT: All right. Then let me ask

02:04:48   25   Ms. Acharya if she has any brief follow-up.

02:04:50   1   MS. ACHARYA: Just briefly, Your Honor.

02:04:51   2   It is my understanding the parties did not have a

02:04:55   3   dispute as to rate rank being defined by the standard. If

02:05:00   4   you look at their opening brief, on Page 6, their first

02:05:04   5   sentence under rate rank says: The parties agree that the

02:05:07   6   term "rate rank" refers to the set of bit rates

02:05:09   7   standardized in the G.709 standard.

02:05:11   8   So the fact that there is a dispute as to how that

02:05:14   9   term was defined is new to me here. I wasn't trying to

02:05:19 10   misrepresent anything. I was just going off of what was in

02:05:23 11   Huawei's briefing.

02:05:24 12   Second, with respect to the processor example that

02:05:27 13   counsel mentioned, you have to look at the specification

02:05:31 14   and how that term is used in the specification. In the

02:05:37 15   generic example that counsel gave, yeah, you may be able to

02:05:41 16   use an after-arising processor if the specification

02:05:45 17   provided enough implementation and enough knowledge for one

02:05:48 18   of ordinary skill in the art to use that after-arising

02:05:51 19   technology within the scope of the specification.

02:05:52 20   The problem that we have here is that the '151

02:05:55 21   patent is very specific to the structure that was defined

02:05:58 22   by the G.709 standard at that time. The standard has

02:06:02 23   evolved a lot since then. And like I mentioned, it now

02:06:07 24   includes rate ranks, such as OD-Flex, which has a

02:06:11 25   completely different structure which wasn't contemplated

02:06:15   1   for by the '151 patent and wouldn't work within the

02:06:18   2   confines of the '151 patent. So you really have to look at

02:06:23   3   what is set forth in the specification and what that patent

02:06:25   4   provides.

02:06:25   5   And that's it, Your Honor, from my end.

02:06:27   6   THE COURT: How would you respond to the argument,

02:06:33   7   Ms. Acharya, that what you've given me today really is more

02:06:37   8   of an enablement argument than it is a claim construction

02:06:40   9   argument?

02:06:40   10   MS. ACHARYA: We believe that this argument needs

02:06:45   11   to be defined as a claim construction argument because it

02:06:47   12   defines the scope of what is rate rank in order to be able

02:06:51   13   to tell the jury clearly what this term is within the

02:06:54   14   claim. Otherwise, rate rank does not really have much of a

02:06:57   15   definition, even within the '151 patent.

02:07:01   16   The reason for this construction is really to

02:07:03   17   provide a little more clarity for the jury as to what this

02:07:06   18   term is that's used over and over within this claim and the

02:07:09   19   specification.

02:07:10   20   THE COURT: All right. All right. Let's move on,

02:07:13   21   then. Our next disputed term for argument, per the

02:07:18   22   parties' priority list, appears to be "time slot" from the

02:07:26   23   '982 patent, Claim 1.

02:07:27   24   And let me hear argument from Verizon first, then

02:07:34   25   I'll hear a response from Huawei.

02:07:38 1   MR. STAFFORD: Good afternoon, Your Honor. This

02:07:40 2   is Patrick Stafford for Verizon. I'll be handling the

02:07:43 3   argument for the "time slot" term.

02:07:45 4   THE COURT: Good afternoon, Mr. Stafford. Please

02:07:48 5   proceed.

02:07:49 6   MR. STAFFORD: If you turn to Slide 22 of

02:07:49 7   Verizon's '982 patent presentation, (audio drops) the term

02:07:55 8   "time slot." Specifically what's shown here is whether the

02:07:59 9   term "time slot" should be construed as its plain ordinary

02:08:08 10 (beeping) to be construed to a tributary slot --

02:08:09 11   THE COURT: Let me stop you --

02:08:09 12   MR. STAFFORD: Yes.

02:08:10 13   THE COURT: Let me stop you, Mr. Stafford. The

02:08:13 14 same clicking that we've been fighting this afternoon has

02:08:17 15 reappeared. After Mr. Barkan dropped off, it went away. I

02:08:21 16 don't know if Mr. Barkan is back. I don't know if there's

02:08:24 17 some other reason why, but the same feedback on this end

02:08:28 18 has reappeared. And, A, it impacts the Court's ability to

02:08:33 19 follow your argument; and, B, it's very annoying. So if we

02:08:39 20 could find a way to delete this feedback clicking on my

02:08:44 21 end, I would appreciate it.

02:08:46 22   Well, it went away. I don't know what somebody

02:08:49 23 did, but let's continue.

02:08:50 24   Go ahead, Mr. Stafford.

02:08:54 25   MR. STAFFORD: Thank you, Your Honor.

02:08:54 1   As addressed in Verizon's briefing, Huawei's

02:08:57 2 proposed construction is not supported by the intrinsic

02:09:00 3 evidence. As shown on Slide 23 of Verizon's presentation,

02:09:05 4 the claim with the term "time slot" is shown. Here it's

02:09:09 5 only shown in Claim 1 because that's the only claim that

02:09:12 6 uses the term "time slot." "Time slot" is not used in the

02:09:17 7 specification, and the specification includes no definition

02:09:19 8 for time slot as meaning a tributary slot.

02:09:22 9   Instead, as is clear from Claim 1, time slot is

02:09:28 10 used to mean its plain and ordinary meaning to one of

02:09:32 11 ordinary skill in the art at the time of the filing the

02:09:35 12 '982 patent.

02:09:35 13   As shown on Slide 24 in Verizon's presentation,

02:09:39 14 time slot has a clear meaning to one of ordinary skill in

02:09:42 15 the art in the networking communications field.

02:09:44 16 Specifically, the term "time slot" means a period of time.

02:09:49 17 In particular, it means a fixed period of time during which

02:09:52 18 data is transmitted or received. The term "time slot" does

02:09:56 19 not refer to a physical structure like a tributary slot.

02:10:00 20 Instead, it is a period of time.

02:10:02 21   The plain and ordinary meaning of the term "time

02:10:06 22 slot" is further confirmed by the dictionary definitions at

02:10:10 23 the time of the filing of the '982 patent.

02:10:13 24   On Slide 25 of Verizon's presentation, the Newton

02:10:18 25 Telecom Dictionary definition is provided which also

02:10:21 1 confirms that time slot is a period of time. In

02:10:24 2 particular, it's a brief moment in time during which the

02:10:27 3 data is transmitted or received.

02:10:29 4   And, again, here this definition proves that time

02:10:33 5 slot is not referring to a physical data structure like a

02:10:35 6 tributary slot. Instead, it's a period of time.

02:10:38 7   On Slide 26 of Verizon's presentation, we

02:10:44 8 addressed the different claims that are at issue in the

02:10:47 9 '982 patent. As shown here, the term "time slot" is used

02:10:50 10 in Claim 1, but the term "tributary slot" is used in Claims

02:10:54 11 4, 5, 8, 9, 11, 12, and 14.

02:10:58 12   As the parties have briefed and they agree,

02:11:03 13 tributary slot refers to a physical structure that's

02:11:07 14 defined by the G.709 standard, but time slot does not refer

02:11:11 15 to a tributary slot and does not have the same meaning as a

02:11:14 16 tributary slot because it's used in the claims as -- and

02:11:17 17 tributary slot is also used in the claims, and they're

02:11:20 18 presumed to have different meanings.

02:11:21 19   THE COURT: But within -- within the context of

02:11:24 20 the OTN art, isn't it fair to say that time slot and

02:11:28 21 tributary slot are the same thing? Do you agree with that

02:11:32 22 or disagree? And if not, why?

02:11:37 23   MR. STAFFORD: No, I don't agree with that, Your

02:11:39 24 Honor.

02:11:39 25   In the OTN art, time slot is still referred to in

02:11:43 1 the networking communications field. So time slot is still

02:11:46 2 a period of time.

02:11:47 3   Tributary slot is a physical structure, and OTN

02:11:50 4 art is defined by the G.709 standard. And the G.709

02:11:56 5 standard has a specific definition for tributary slot

02:11:58 6 (beeping) codified in the G.709 standard, and it's a coined

02:12:02 7 term for that standard.

02:12:03 8   So one of ordinary skill in the art in the OTN

02:12:05 9 field would understand that time slot still exists, still

02:12:07 10 is used in the OTN field to mean a period of time, not to

02:12:11 11 mean a physical structure as a data structure which would

02:12:15 12 be a tributary slot used in the G.709 standard.

02:12:18 13   THE COURT: All right.

02:12:22 14   MR. STAFFORD: And, Your Honor, on Slide 27, we

02:12:25 15 just provide the legal authority that also confirms that

02:12:28 16 there's a presumption that claim terms are presumed to have

02:12:31 17 different meanings within the claims.

02:12:34 18   So here, time slot and tributary slot are presumed

02:12:37 19 to have different meanings. And we know that Huawei has

02:12:39 20 not proven that this presumption is overcome here for time

02:12:44 21 slot and tributary slot terms.

02:12:52 22   And unless Your Honor has any other questions,

02:12:55 23 that is Verizon's argument on time slot.

02:12:58 24   THE COURT: All right. Let me hear from Huawei,

02:13:03 25 please.

02:13:03   1   MR. NEMUNAITIS: Your Honor hit on the key issue

02:13:05   2   with respect to this dispute which is whether or not these

02:13:09   3   terms are interchangeable in the OTN field. That's a

02:13:12   4   question of fact, and so I'd like to go through the

02:13:15   5   evidence that both sides have presented to see how the

02:13:18   6   Court can weigh the evidence.

02:13:20   7   In our slide presentation, we identify some of

02:13:22   8   this evidence, and so I'll -- I'll refer to the slide

02:13:25   9   numbers in our presentation but then also read through the

02:13:28   10 important points here.

02:13:29   11   We submitted the declaration -- and I'm sorry,

02:13:33   12 Your Honor, I'm on Slide No. 38 of our presentation if you

02:13:39   13 would like to follow along.

02:13:40   14   We submitted the declaration of Dr. Bortz,

02:13:44   15 qualified expert familiar in the field of OTN. No attack

02:13:48   16 on his credentials there. He testified that after

02:13:50   17 providing an explanation of the history of these terms, how

02:13:53   18 they're used to refer to the concepts in G.709, which I

02:13:58   19 won't read you all of that, but his conclusion is for these

02:14:02   20 reasons, the terms "tributary slot" and "time slot" are use

02:14:06   21 interchangeably in the OTN field.

02:14:07   22   Mr. Bortz also analyzed two documents from the

02:14:13   23 ITU. That's a standards setting body that sets forth the

02:14:17   24 G.709 standard.

02:14:18   25   The first of those documents is the official G.709

02:14:25 1 tutorial presented by the ITU. In Paragraph 7 of his

02:14:28 2 declaration, he states: The G.709 tutorial prepared by the

02:14:33 3 ITU itself refers to tributary slots as time slots.

02:14:37 4   At Page 40, for example, it says: Thus, we have

02:14:39 5 to account for a data rate mismatch of 144,067 rate per

02:14:44 6 second by stuffing. This stuffing is done on a multi-frame

02:14:45 7 basis. Each time slot is stuffed once per four frames.

02:14:50 8 Mr. Bortz explains that that refers to the tributary slots

02:14:54 9 defined in the G.709 standard.

02:14:57 10   He also refers to the G.798 standard which is a

02:15:02 11 related standard that refers back to the G.709 standard.

02:15:05 12 Again, I won't read through the -- the technical language,

02:15:08 13 but he, again, shows examples of how this document from the

02:15:12 14 ITU also uses time slots and tributary slots as

02:15:15 15 interchangeable terms.

02:15:16 16   We also submitted the testimony of Verizon's IPR

02:15:19 17 expert, Dr. Min, who testified that the G.709 standard

02:15:24 18 multiplexes signals by combining multiple transport

02:15:25 19 structures of one k index into a single transport structure

02:15:29 20 of a higher k index that is a higher bit rate which has

02:15:32 21 been divided into time slots known as tributary slots.

02:15:36 22 That's in Paragraph 34 of his declaration.

02:15:41 23   Verizon's also submitted evidence on this issue.

02:15:46 24 They submitted the expert's declaration from Dr. Ralph.

02:15:50 25 When you look at his declaration, though, and I won't read

02:15:53   1   through all of it, what he does is he reads through

02:15:57   2   portions of the patent, he reads through the dictionary

02:16:00   3   definition that Verizon presented in the argument you heard

02:16:04   4   just now, and he says: Based on this dictionary

02:16:06   5   definition, I believe that that provides a reasonable

02:16:10   6   definition of the term "time slot."

02:16:12   7   At no point does he dispute that in the OTN field,

02:16:16   8   these two terms are used interchangeably.

02:16:19   9   And when you look at that dictionary definition,

02:16:23 10   that comes from Newton's Telecom Dictionary. That is a

02:16:28 11   general dictionary for telecom concepts. It's not

02:16:32 12   something specific to OTN.

02:16:34 13   So in resolving this as a fact issue, you have

02:16:38 14   declarations from two different experts, official documents

02:16:41 15   from the ITU, and that is -- it needs to be weighed against

02:16:46 16   this general dictionary and testimony from Verizon's expert

02:16:49 17   which does not address this issue and does not dispute the

02:16:52 18   testimony from the other experts.

02:16:53 19   And so for that reason, we believe that we have

02:16:58 20   shown that the more reasonable construction is to identify

02:17:05 21   these terms as interchangeable.

02:17:07 22   I would also refer briefly to the intrinsic

02:17:10 23   evidence. One of the things the parties point out in the

02:17:13 24   briefing is that there was a parent application to the '982

02:17:15 25   that contains an identical specification, except it uses

02:17:19   1   the term "time slot" in place of "tributary slot."

02:17:22   2   So, for example, the '982 patent explains that an

02:17:27   3   HO OPU2 is divided into eight 1.25G tributary slots. The

02:17:32   4   parent application says that an HO OPU2 is divided into

02:17:39   5   eight 1.25G time slots.

02:17:39   6   There's been no evidence from Verizon that those

02:17:42   7   statements are referring to two different things. Instead,

02:17:44   8   the most reasonable inference from all the evidence is that

02:17:47   9   these two terms were used interchangeably in the

02:17:51   10   applications just as they are in the industry.

02:17:53   11   And so for that reason, we believe these two terms

02:17:57   12   should be interpreted as interchangeable.

02:18:00   13   THE COURT: All right. Anything further for

02:18:03   14   Verizon, Mr. Stafford?

02:18:07   15   MR. STAFFORD: Yes, just to first address the

02:18:10   16   expert declaration argument. The Dr. Ralph declaration

02:18:13   17   that Huawei cites does not say that tributary slots and

02:18:17   18   time slots are used interchangeably. Instead, it clearly

02:18:21   19   states that time slot has a relevant meaning to one of

02:18:21   20   ordinary skill in the art, and it provides that meaning as

02:18:23   21   being a fixed period of time.

02:18:24   22   Additionally, Dr. Bortz's declaration -- it's two

02:18:32   23   different documents. But, again, Huawei doesn't prove that

02:18:35   24   the word "time slot" is used interchangeably with

02:18:39   25   "tributary slot." Instead, these documents show that

02:18:42 1   tributary slot exists within the G.709 standard, and it's

02:18:44 2   defined in the G.709 standard. And that time slot is not

02:18:48 3   used in the G.709 standard and is not used interchangeably

02:18:52 4   within the G.709 standard for tributary slot.

02:18:53 5   And then the final argument that they made about

02:18:56 6   the intrinsic evidence, there is no evidence showing that

02:19:00 7   time slot and tributary slot were treated interchangeably

02:19:04 8   by Huawei. In fact, the evidence shows the contrary

02:19:07 9   because they amended the specification or used the term

02:19:10 10 "time slot" to change it to say "tributary slot." So they

02:19:12 11 clearly meant that tributary slot was different. If they

02:19:16 12 thought it was the same thing, they wouldn't have amended

02:19:19 13 the specification to state that it was tributary slot when

02:19:22 14 they filed the '982 patent application.

02:19:27 15   THE COURT: All right. Thank you, counsel.

02:19:28 16   Let's move on. The next term for argument is

02:19:38 17 going to be out of the '236 patent, and that's "client

02:19:51 18 signal byte number Cn."

02:19:57 19   Let me hear from Huawei on this one first. We'll

02:20:00 20 change the order a little bit. This would be Mr. Hamad? I

02:20:00 21 see your lips moving, but I don't hear you, sir.

02:20:20 22   MR. HAMAD: Yes, Your Honor, Hamad Hamad for

02:20:22 23 Huawei.

02:20:22 24   THE COURT: Now I hear you. Please continue.

02:20:24 25   MR. HAMAD: Thank you, Your Honor.

02:20:26 1   Your Honor, may I inquire if you have our slide

02:20:30 2   deck for the claim construction hearing for Huawei?

02:20:41 3   THE COURT: I'm sure I do. Just a moment.

02:20:46 4   I've got it, counsel.

02:20:48 5   MR. HAMAD: Thank you, Your Honor.

02:20:49 6   For Your Honor's reference, I'm starting on Slide

02:20:53 7   44.

02:21:03 8   THE COURT: I'm there.

02:21:04 9   MR. HAMAD: Thank you, Your Honor.

02:21:04 10   I'm presenting argument on the '236 and '505

02:21:09 11 patents. And starting at Slide 45, we have the first term,

02:21:09 12 "client signal byte number." The primary dispute here is

02:21:15 13 whether the term should be limited to a specific equation

02:21:19 14 from one version of the standard as Verizon proposes.

02:21:21 15   On Slide 46, I just wanted to put things in

02:21:26 16 perspective, comparing the standard that Verizon relies on

02:21:31 17 with the '236 patent.

02:21:33 18   So this is the December 2009 version of the

02:21:37 19 standard, and you can see on the right, the '236 patent has

02:21:41 20 a priority date going back to 2007 on the PCT in '08. So

02:21:47 21 the standard they rely on post-dates the '236 patent.

02:21:50 22   What -- what Verizon essentially relies on

02:21:55 23 actually is an internal ITU working document called the

02:21:58 24 Living List for 2006. And the theory is that there were

02:22:04 25 equations proposed in the Living List document that were

02:22:07   1   ultimately adopted in the 2009 standard and that this

02:22:12   2   defines and fixes in time the meaning of the term "client

02:22:19   3   signal byte number."

02:22:20   4   Notably, the specification itself does not define

02:22:24   5   or reference the term "client signal byte number" with

02:22:28   6   respect to any particular equation.

02:22:30   7   On Slide 47, here are some examples of how the

02:22:35   8   specification mentions this -- this claim term. Again, it

02:22:38   9   describes the full claim term, "client signal byte number

02:22:42 10 C_n," and there's no specific definition as to a particular

02:22:47 11   equation.

02:22:47 12   THE COURT: Let me ask you a question, counsel.

02:22:50 13   MR. HAMAD: Yes, Your Honor.

02:22:51 14   THE COURT: Is C_n in the patent, in your view,

02:22:55 15   co-existent with C_n in the standard?

02:22:58 16   MR. HAMAD: Yes, it's consistent with -- with C_n

02:23:01 17   in the standard. I think the parties agree on that. I

02:23:05 18   think the issue is whether it should be limited to a

02:23:07 19   particular way to calculate C_n and -- and also fixed in

02:23:10 20   time to one version of the standard.

02:23:12 21   THE COURT: All right. Continue with your

02:23:15 22   argument, please.

02:23:16 23   MR. HAMAD: Thank you.

02:23:17 24   I'm on Slide 48, Your Honor. And here you can see

02:23:22 25   the excerpt of a standard that -- that Verizon relies on.

02:23:26 1 And so Verizon's initial proposal draws from the Section

02:23:33 2 D.1 basic principles, and it takes just that first equation

02:23:37 3 D-1.

02:23:39 4   Huawei's expert, Dr. Bortz, in his declaration and

02:23:42 5 in Huawei's opening brief, we point out that even on the

02:23:45 6 same page, there were other equations that -- that

02:23:47 7 referenced Cn. And the two that we pointed out were D-2

02:23:51 8 and D-6.

02:23:52 9   In response, Verizon responded that it would not

02:23:55 10 be opposed to including those two equations in its

02:23:58 11 construction.

02:23:59 12   So it kind of recognized that -- that D-1 alone

02:24:04 13 wouldn't work, and there's actually a technical reason for

02:24:07 14 that in that the Cn value that's transported in the OTN has

02:24:11 15 to be an integer value. And so that's what you actually

02:24:14 16 see in Equation D-2. It's a function of that same

02:24:17 17 expression to ensure that you have an integer to -- to

02:24:23 18 transmit.

02:24:23 19   The issue that -- even if you were to pack more

02:24:25 20 equations into the construction, it doesn't fix the -- the

02:24:28 21 problem.

02:24:30 22   On Slide 49, one of the things that Verizon's

02:24:34 23 proposal doesn't account for is even in the same annex of

02:24:38 24 the standard that they're relying on, in this section

02:24:40 25 applying a GMP protocol in OTN. Well, this patent is about

02:24:47 1 optical transport networks, so this section is relevant.

02:24:50 2 And it has its own equations. Some of those equations have

02:24:55 3 expressions or have algebraic exercises that can be done to

02:25:00 4 also develop an expression for Cn.

02:25:00 5   There -- also in both in Section D.2 and then in

02:25:04 6 D.1 that Verizon relies on -- and now I'm on Slide 50 --

02:25:08 7 there are a narrative non-equation descriptions in the

02:25:13 8 standard of Cn. And so at -- Slide 50 actually shows the

02:25:16 9 page that Verizon relies on for equation D-1. And

02:25:20 10 Verizon's proposal does not account for these descriptions

02:25:23 11 or does not include them, and it just has this particular

02:25:26 12 way to calculate it.

02:25:27 13   Slide 51, Your Honor, we tried to show what

02:25:33 14 Verizon's proposal would look like in the claim language --

02:25:36 15 Claim 1, if you were to take the equation D-1 and plug it

02:25:40 16 in place of the -- of the challenged claim term.

02:25:43 17   So what you see here is you're introducing new

02:25:46 18 variables, and it makes the claim language needlessly

02:25:51 19 complex and confusing. It's also unhelpful and potentially

02:25:54 20 confusing to the jury who's trying to reach determinations

02:25:55 21 of infringement. And -- and this is just one equation,

02:26:00 22 D-1. If you were to take Verizon's suggestion of, okay,

02:26:03 23 well, we can map D-2 and D-3, you would have a claim

02:26:06 24 language with this equation or that equation or that

02:26:09 25 equation which would become more unwieldy.

02:26:12   1   One -- one argument that Verizon makes that this

02:26:17   2   is required or this is necessary because the claim language

02:26:19   3   in the specification make clear that Cn is generated

02:26:23   4   according to a client signal clock and a system clock.

02:26:28   5   And Slide 52, the claim language already recites

02:26:31   6   that. It recites that generating a client signal byte

02:26:34   7   number Cn according to a client signal clock and system

02:26:38   8   clock.

02:26:39   9   So when you look at the claim term in -- in the

02:26:40 10   context of the entire claim element and the claim language,

02:26:45 11   it's consistent with the specification and the standard.

02:26:47 12   So this makes -- in addition to the other issues

02:26:50 13   identified, this makes Verizon's proposal superfluous.

02:26:53 14   So in sum, we don't think that there's a need to

02:26:57 15   limit this claim term to one conclusion from one reading of

02:27:02 16   the standard, particularly when the standard has a variety

02:27:04 17   of different event equations or expressions to describe Cn.

02:27:10 18   It has narrative non-leading descriptions of Cn. And so

02:27:14 19   for those reasons, we submit Verizon's proposal should be

02:27:17 20   rejected.

02:27:18 21   One quick point on Huawei's proposal. We tried to

02:27:21 22   propose something that was we thought a reasonable

02:27:24 23   reflection of the plain meaning of the term. The one piece

02:27:27 24   there that you see where we tried to add a clarifying

02:27:32 25   modifier would be in the OTN frame. It would be -- I'm not

02:27:35   1   trying to say anything or mischaracterize anything, but I

02:27:39   2   don't think that part of it is disputed as a technical

02:27:41   3   matter. If the Court is not inclined to -- to construe it

02:27:45   4   and just leave it as the plain language, we would be fine

02:27:46   5   with that, as well.

02:27:47   6   Thank you, Your Honor.

02:27:47   7   THE COURT: All right. Let me hear from Verizon

02:27:50   8   in response.

02:27:54   9   MR. VERHOEVEN: Good afternoon, Your Honor.

02:27:58   10 Charles Verhoeven. And can you hear me okay?

02:27:59   11   THE COURT: I can hear you fine, counsel. Go

02:28:03   12 ahead.

02:28:03   13   MR. VERHOEVEN: Okay. Your Honor, if we could

02:28:06   14 turn to the slide deck for the '236 patent that we

02:28:10   15 submitted, I believe, last night or yesterday.

02:28:12   16   THE COURT: I have that.

02:28:13   17   MR. VERHOEVEN: I don't know if you have that,

02:28:15   18 Your Honor.

02:28:15   19   THE COURT: I do.

02:28:16   20   MR. VERHOEVEN: And in particular, I'd like to

02:28:19   21 direct Your Honor's attention to Slide No. 9.

02:28:27   22   So on this slide, the issue here -- before I get

02:28:33   23 into the slide, the issue is whether or not Cn has some

02:28:36   24 meaning that's outside of its use here in the standard.

02:28:41   25 And I think it's undisputed, the answer to that is no.

02:28:45 1 It's a coined term that is defined in the standard.

02:28:49 2   And so the question is, you know, do you -- do you

02:28:55 3 accept the definition in its entirety, or do you just

02:28:59 4 ignore the calculation and refer to the name of Cn -- given

02:29:04 5 to Cn as part of the formula for the calculation, which we

02:29:08 6 would submit is not appropriate.

02:29:10 7   But let me start by -- with the intrinsic record,

02:29:14 8 Your Honor.

02:29:14 9   And if you look at Column 5, Line 17 through 29,

02:29:19 10 the patent states: In the embodiments of the present

02:29:22 11 disclosure, according to the CBR mapping method described

02:29:27 12 in International Telecommunications

02:29:31 13 Union-Telecommunications Standardization Sector, ITU-T,

02:29:36 14 Recommendation 6709 Living List SP13, comma, new Cbyte

02:29:45 15 generating and explaining rules of operation -- operation

02:29:49 16 method, therefore, are defined.

02:29:51 17   So the specification is telling a person of

02:29:56 18 ordinary skill in the art that what we're -- what we mean

02:30:00 19 by these -- by Cbyte generating the rules and the operation

02:30:05 20 method is those contained in this Living List SP13, Your

02:30:10 21 Honor.

02:30:10 22   And the Living List, as counsel pointed out, was

02:30:17 23 sort of an interim standards document, but it's a specific

02:30:23 24 document that we have that we can look at. And it was what

02:30:28 25 existed at the time and what they chose to refer to to

02:30:31 1 define Cn.

02:30:34 2   Next slide.

02:30:36 3   Now, Slide 10, Your Honor, I think it's important

02:30:42 4 to note that we're not talk -- the claims are not merely

02:30:44 5 referring to Cn as a value like in passing. Instead, the

02:30:57 6 claim itself requires, quote, generating a client signal

02:31:04 7 byte number Cn. So it's not just referring to Cn, that

02:31:08 8 this element requires that Cn be generated.

02:31:15 9   And the Living List below on the left, Your Honor,

02:31:19 10 provides a formula for the generation of Cn.

02:31:23 11   Now, I'd like to take the top -- the top box

02:31:28 12 there -- the top algorithm. And, basically what this is

02:31:34 13 saying, Your Honor, is this is -- it explains exactly how

02:31:38 14 to calculate Cn. And I'm not going to go into the math,

02:31:41 15 but it's basically using the speed of the client signal

02:31:45 16 coming in and the speed of the OTN going out, and putting

02:31:51 17 those into a formula to decide whether Cn needs to go up or

02:31:56 18 down.

02:31:57 19   And that is what the patent clearly says it's

02:32:00 20 referring to when we're talking about Cn. And when we're

02:32:06 21 talking about generating a Cn, you need to look at this

02:32:10 22 formula.

02:32:11 23   Now, there's a formula below it that has different

02:32:14 24 variables, and there's a formula later on that counsel

02:32:18 25 points to, as well.

02:32:20 1   Those are not inconsistent with the first formula,

02:32:23 2 Your Honor. This is algebra, and they're just rearranging

02:32:28 3 different variables. But it's the same calculation of Cn

02:32:31 4 across all these algorithms. And that's why we said in our

02:32:34 5 reply, Your Honor, that we can include all of them because

02:32:38 6 they're all -- they're all being the same -- they all

02:32:41 7 calculate Cn the same way.

02:32:42 8   But what -- what I would say, Your Honor, is

02:32:49 9 that -- that counsel's proposed construction is -- is

02:32:53 10 unacceptable because it's like being half pregnant.

02:32:58 11   And so what they've done is they've pointed down

02:33:01 12 to this formula to the -- to the bottom where it says

02:33:05 13 wherein Cn is the number of client information entities,

02:33:08 14 n bits, per server frame.

02:33:10 15   But they divorce it from the calculation. They

02:33:15 16 say: Oh, yeah, we need to use the standard, Your Honor,

02:33:18 17 and here we're pulling it out of a portion of an assumption

02:33:23 18 that's contained in this formula, but we're not going to

02:33:26 19 include the rest of the formula.

02:33:28 20   And so we've -- we've cut out from the

02:33:32 21 construction how you generate the Cn. It's no longer

02:33:38 22 generated according to the Living List, which the patent

02:33:42 23 specification itself says is the definition we should look

02:33:46 24 at for these things.

02:33:48 25   Let's see, one more slide, Your Honor.

02:33:59 1   And then when you go to the actual standard, the

02:34:07 2   standard itself says that Cn, quote, is defined by this

02:34:10 3   formula. And so there's not -- it's not a question of

02:34:14 4   ambiguity. A person of ordinary skill in the art would

02:34:17 5   pick up the Living List and would look at where Cn is in

02:34:25 6   that Living List, and they'd see the rules for how to

02:34:29 7   generate a Cn, and they'd follow those rules so that they

02:34:32 8   can have a Cn -- generate a Cn. If they don't follow those

02:34:36 9   rules, they're not generating a Cn because Cn is defined

02:34:40 10 within that calculation.

02:34:40 11   So we would submit that this is a case where the

02:34:45 12 specification incorporates the standards definition for the

02:34:50 13 methodology and calculations used to generate Cn.

02:34:56 14   And that's all I have, Your Honor, unless you have

02:34:58 15 any questions.

02:34:58 16   THE COURT: What you're really telling me,

02:35:01 17 Mr. Verhoeven, is that you're proposing for the Court to

02:35:03 18 construe Cn but not the rest of this section of the claim

02:35:08 19 language? You're not asking me to construe client signal

02:35:13 20 byte number, just Cn, correct?

02:35:16 21   MR. VERHOEVEN: I think so, yes. Let me just

02:35:19 22 check our -- Cn is fine, just construing Cn.

02:35:32 23   THE COURT: Well, my reading of your submission is

02:35:35 24 that's what you've limited your request to the Court to be.

02:35:38 25 If you're asking me to do more than that, please tell me.

02:35:41 1   MR. VERHOEVEN: I am not.

02:35:42 2   THE COURT: Okay. Let me see if Huawei has any

02:35:49 3   follow-up.

02:35:50 4   MR. HAMAD: Yes, Your Honor, a few points.

02:35:52 5   I guess I'd like to actually start on Slide 9 of

02:35:57 6   Mr. Verhoeven's deck where he points to excerpts of the

02:36:02 7   specification.

02:36:03 8   So first, the section on the left is referencing

02:36:09 9   Cbyte, which is understood to be the field where the client

02:36:16 10 signal byte number information goes. And that is not an

02:36:21 11 indication in the specification that the inventors intended

02:36:24 12 to define or limit the term "client signal byte number Cn"

02:36:29 13 to -- to what is referenced here in the Living List.

02:36:33 14   Then the other point on Slide 10 of

02:36:39 15 Mr. Verhoeven's deck, the equations in the Living List that

02:36:46 16 are referenced there, they're not identical to the equation

02:36:51 17 D-1 that they are now proposing as part of the

02:36:55 18 construction.

02:36:58 19   And one more point that Your Honor hit on, which

02:37:00 20 is that all of the arguments has been about the constituent

02:37:07 21 variable Cn without regard to the larger phrase "client

02:37:11 22 signal byte number Cn." And that's not just a difference

02:37:17 23 without meaning.

02:37:19 24   When you look at Cn alone, for example, as

02:37:23 25 described in conjunction with equation D-1, that's a

02:37:27 1 reference to number of clients n bit data entities. And

02:37:32 2 here your -- the claim language is a byte number.

02:37:35 3   So we're looking at slightly different levels of

02:37:39 4 granularity in terms of what -- I guess the size of the

02:37:44 5 number we're looking at.

02:37:45 6   So kind of on balance, we're still back to a place

02:37:51 7 where Cn would be consistent with the standard, but there's

02:37:54 8 not any indication or any reason to limit it to one

02:37:57 9 particular calculation. It's not just equation D-2 and

02:38:01 10 D-6, I guess, that -- that would fix it. D-7 is another

02:38:07 11 integer function of -- that -- for Cn, when you have, you

02:38:10 12 know, equations in Section D.2 on the GMP in OTN. So on

02:38:16 13 balance, we don't think that it can be limited to just that

02:38:18 14 one equation.

02:38:20 15   THE COURT: All right. Anything further from

02:38:24 16 Verizon, Mr. Verhoeven, on this term?

02:38:26 17   MR. VERHOEVEN: Just one -- one thing. I

02:38:30 18 apologize if I've already said it, but they have pointed to

02:38:36 19 the Living List. Their proposal for Cn is taken straight

02:38:42 20 from the Living List, quote, number of client information

02:38:46 21 entities, n bits, per serverframe. And, you know,

02:38:49 22 that's -- that's taking what they want but not what they

02:38:52 23 don't want from the standard. And you're either defined by

02:38:56 24 the standard or you're not defined by the standard.

02:38:59 25   And so we would submit that their proposed

02:39:03 1 construction shows that they admit that this is where a

02:39:06 2 person of ordinary skill would go to find the meaning

02:39:09 3 because it's taken verbatim, and right above that is the

02:39:13 4 algorithm. And there's no reason that a person of ordinary

02:39:18 5 skill would use a part of that algorithm as definitional

02:39:22 6 and not the rest of it.

02:39:23 7   That's all I have, Your Honor.

02:39:24 8   THE COURT: All right. Thank you, counsel.

02:39:27 9   Let's go to our next set of disputed claim

02:39:34 10 language, this also from the '236 patent. And we'll take

02:39:40 11 up if the Cn transported in the OTN frame needs to be

02:39:45 12 increased or decreased and the Cn transported in the OTN

02:39:52 13 frame doesn't need to be increased or decreased.

02:39:55 14   Looks like Verizon's argument here is that this is

02:40:00 15 indefinite, and I'd like to hear that argument first. Then

02:40:05 16 I'll hear from Huawei.

02:40:07 17   Mr. Verhoeven?

02:40:08 18   MR. VERHOEVEN: Thank you, Your Honor.

02:40:08 19   So this is just improper -- if it -- well, let me

02:40:16 20 back up.

02:40:17 21   This is an "if/then" phrase. And the "if" part of

02:40:21 22 the "if/then" phrase, Your Honor, is not defined or

02:40:24 23 disclosed in the specification, and that's the problem.

02:40:30 24   So we don't know whether the "then" comes. And if

02:40:35 25 the "if" part of the phrase is in the claim language, it's

02:40:39   1   claimed in this particular -- in these particular frames,

02:40:43   2   and so you need to be able to determine what -- what are

02:40:45   3   the circumstances surrounding when the Cn transported in

02:40:50   4   the OTN frame needs to be increased and what are the

02:40:53   5   circumstances where it needs to be decreased, otherwise,

02:40:57   6   you don't know if the "then" comes.

02:41:04   7   So just a simple -- just one second, Your Honor --

02:41:08   8   THE COURT: I don't see a "then" in the claim

02:41:11   9   language, counsel. I guess that's your point.

02:41:12 10   MR. VERHOEVEN: It doesn't say -- you're right,

02:41:14 11   Your Honor. And I apologize for not saying that. But it

02:41:17 12   is an "if/then" logic.

02:41:18 13   So it says if the -- I'm on Slide 17, Your Honor,

02:41:22 14   of our presentation.

02:41:27 15   For example, it says: If the Cn transported in

02:41:31 16   the OTN frame needs to be increased -- and then it has the

02:41:34 17   reversing language. So if it doesn't need to be increased,

02:41:38 18   you don't do the reversing. In fact, there's another

02:41:42 19   element I don't have on the slide, Your Honor, but it's the

02:41:44 20   next element, which says if it needs to be decreased, then

02:41:48 21   you do something different.

02:41:49 22   And so in order to -- for a person to know whether

02:41:56 23   or not they're practicing this claim, they need to know in

02:42:00 24   what circumstances would the Cn as claimed here need to be

02:42:04 25   increased and in what circumstances does it need to be

02:42:07 1 decreased? Otherwise, they don't know whether they're

02:42:12 2 infringing the claim if they reverse the values of the

02:42:15 3 first series or they reverse the values of the second --

02:42:18 4 second series -- series of positions in the area.

02:42:21 5   And so this is -- in my opinion, it's a drafting

02:42:26 6 issue. There's other claims that don't have this language

02:42:29 7 that they can use, Your Honor. But in this -- on these

02:42:34 8 particular set of claims, they have included in the claim

02:42:37 9 something that's outside the scope of what's in their

02:42:41 10 specification. And there's no description in the

02:42:43 11 specification that I could find, Your Honor, that indicates

02:42:46 12 what situations this would -- in what situations this would

02:42:50 13 happen in order to provide metes and bounds here.

02:42:56 14   THE COURT: Let me -- let me ask you this,

02:42:59 15 counsel. It -- it seems to me from the briefing and from

02:43:02 16 what I'm hearing that what you're in effect telling the

02:43:05 17 Court is that "needs to" is a subjective term that isn't

02:43:12 18 clearly understood and is a matter of some subjective

02:43:15 19 judgment that's otherwise undefined.

02:43:23 20   And I would -- I would ask you as a counter to

02:43:29 21 that, assuming that's your initial position, certainly if

02:43:36 22 "needs" is in isolation, it has a subjective connotation,

02:43:41 23 but you can need to do something to achieve a specific

02:43:46 24 result. To achieve this result, you need to move this to

02:43:50 25 another position. To achieve this, you need to do that.

02:43:53   1   In -- in a situation where the "needs to" action

02:43:59   2   is tethered to an intended result, it's really not

02:44:05   3   subjective, is it? And is that the case here? Or is the

02:44:08   4   judgment of what needs or doesn't need to be done

02:44:11   5   untethered to an intended result, and, therefore, perhaps

02:44:16   6   subjective and indefinite? What's -- what's your response?

02:44:22   7   MR. VERHOEVEN: Well, my view is -- is this --

02:44:26   8   this is partly how you draft claims. And they have other

02:44:29   9   claims where they just say reversing, and they have

02:44:34   10 other -- that have these two elements that don't have this

02:44:35   11 language, Your Honor. And this language is part of the

02:44:38   12 claim and --

02:44:42   13   THE COURT: The fact -- the fact that they

02:44:43   14 don't -- the fact that they don't use the word "needs" in

02:44:44   15 another claim is really not persuasive here. I think the

02:44:47   16 Court's got to look at this claim language on its own and

02:44:53   17 not whether it's different from or similar to the way other

02:44:57   18 claim language is presented.

02:44:58   19   I'm really trying to focus on this particular

02:45:01   20 claim language, not some kind of comparison to other claim

02:45:05   21 language.

02:45:05   22   MR. VERHOEVEN: Thank you, Your Honor.

02:45:06   23   And I'll just say in response that it could be

02:45:12   24 subjective, it could be -- yeah, I guess you'd call it

02:45:17   25 subjective. You know, someone could set up a system that

02:45:21 1 defines when it needs to be increased or decreased. And

02:45:24 2 that might be mechanical and not discretionary, but it's

02:45:29 3 discretionary to the person to set up that system. So in

02:45:33 4 that sense, it's -- I agree, it's subjective.

02:45:35 5   But the -- the point I'm trying to make, Your

02:45:39 6 Honor, is we don't know whether or not this element is met,

02:45:47 7 and there's two options in the claim, and -- and they

02:45:53 8 depend on -- which option you choose depends on whether

02:45:58 9 these could be increased or decreased.

02:46:02 10   And so in order to know whether you're infringing

02:46:05 11 as a matter of logic, you need to know whether these are

02:46:08 12 triggered as stated in the claim. And because it just says

02:46:11 13 needs to be and doesn't provide further guidance, Your

02:46:15 14 Honor, this is why we're alleging that it's indefinite.

02:46:18 15   THE COURT: All right. Let me hear a response

02:46:19 16 from Huawei, please.

02:46:20 17   MR. HAMAD: Thank you, Your Honor.

02:46:27 18   I'm on Slide 54 of the Huawei claim construction

02:46:30 19 deck. And I do want to touch on the -- the counterpoint

02:46:36 20 that Your -- that Your Honor made, which is read in -- read

02:46:40 21 in the context of the claim language, it does not need to

02:46:44 22 be subjective or it does not need to be read to be

02:46:47 23 subjective.

02:46:48 24   And, also, one thing I want to point out about the

02:46:51 25 claim language is that the language itself doesn't actually

02:46:53   1   require you to make the determination of whether Cn needs

02:46:56   2   to be increased or decreased. It just says: If this

02:46:58   3   determination has been made, do this thing.

02:47:01   4   But in any event, the specification does have

02:47:05   5   adequate disclosure of the conditions in which Cn would

02:47:09   6   need to be increased or decreased.

02:47:11   7   I'm on Slide 55 of our deck. And what we're

02:47:16   8   looking at here on the left is Figure 7. And what I've

02:47:21   9   highlighted is this buffer unit 72 sending out this

02:47:24   10 threshold -- threshold indication signal.

02:47:27   11   The specification has description about this and

02:47:32   12 the conditions in a couple different places, but I'm going

02:47:34   13 to go to Slide 56 and back out of the specification just to

02:47:38   14 kind of conceptually walk through how this works.

02:47:41   15   So the buffer unit has -- and what we show in red

02:47:47   16 is this lower threshold, and then in green, we show an

02:47:49   17 upper threshold. The client data is written into the

02:47:52   18 buffer unit at the client signal clock writing rate. This

02:47:54   19 fills the buffer unit with client data.

02:48:00   20   What you also have -- what you also have happening

02:48:02   21 is that the client data is read out of the buffer unit at

02:48:05   22 the system clock reading rate. So it empties the buffer of

02:48:08   23 client data which is placed in the payload area to be sent

02:48:13   24 out on the OTN.

02:48:20   25   On -- on Slide 57, Figure 7, and so what happens

02:48:22   1   is when you hit the upper threshold, the buffer unit sends

02:48:25   2   the threshold indication signal to -- to the Cn value

02:48:28   3   generating unit 74, and it says: We need to increase Cn.

02:48:34   4   If it hits the lower threshold, it says: We need to

02:48:38   5   decrease Cn.

02:48:39   6   And the excerpt on the right starting on the line

02:48:43   7   "if the monitoring module 106," what that does is it

02:48:48   8   describes these threshold indication signals that are

02:48:50   9   coming from the buffer unit in relation to the reversing of

02:48:55 10   the values of the bit positions, which is the remainder of

02:48:59 11   the claim language that has these elements at issue.

02:49:01 12   Slide 58 shows just another description of -- of

02:49:08 13   these conditions in relation to Figure 8 which the patent

02:49:11 14   describes as a state machine. Highlighted are the

02:49:13 15   increasing state and the decreasing state.

02:49:17 16   And then finally -- finally on Slide 59, the --

02:49:21 17   the challenged claim terms' indefiniteness analysis have to

02:49:27 18   be considered in -- obviously in light of specification as

02:49:29 19   a whole. And so if you were to read the claim language,

02:49:35 20   the specification's disclosure, a person of ordinary skill

02:49:39 21   in the art would reasonably be informed by the scope of the

02:49:42 22   claims. And Verizon hasn't met a clear and convincing

02:49:45 23   burden to show otherwise.

02:49:46 24   THE COURT: All right. Anything further from

02:49:48 25   Verizon, Mr. Verhoeven, on this?

02:49:51 1   MR. VERHOEVEN: Yes, very briefly, Your Honor.

02:49:53 2   The section of the specification that counsel

02:50:01 3 is -- showed on Slide 57, first, as a matter of process,

02:50:05 4 this was not cited in the joint claim construction

02:50:08 5 statement as evidence that would be relied on.

02:50:11 6   So as a matter of the Court's rules and

02:50:14 7 procedures, this should not be appropriate evidence for

02:50:17 8 them to be citing at this point in the case.

02:50:24 9   Second -- second point, Your Honor, is this is --

02:50:26 10 this is an example from the specification, and it expressly

02:50:31 11 says so. It doesn't provide the metes and bounds for when

02:50:36 12 you should increase or when you should decrease, Your

02:50:40 13 Honor. It -- it's just an example.

02:50:45 14   And you can see that as reflected -- pardon me --

02:50:48 15 you can see that as reflected in the proposed claim

02:50:51 16 construction for Huawei. They don't propose any of

02:50:56 17 these -- they don't propose anything from this example but

02:51:00 18 just a general -- a general term.

02:51:04 19   And finally they're pointing to this FIFO buffer

02:51:08 20 unit as the, I guess, structure for what they're talking

02:51:14 21 about.

02:51:15 22   Now, I know Your Honor said you don't like to

02:51:17 23 compare claims. I'll be very, very brief. But there's an

02:51:22 24 apparatus claim in this patent that mirrors this method

02:51:24 25 claim. And in the apparatus claim, they point -- the --

02:51:29 1 there's a -- there's provisions -- and I don't have it on a

02:51:33 2 slide, Your Honor, I apologize. But there's provisions

02:51:35 3 just like there is in -- in the claim at issue where you

02:51:40 4 increase -- or you reverse one set for increasing and you

02:51:46 5 reverse another set for decreasing. And that the

02:51:48 6 associated portion of the spec that was pointed to that

02:51:55 7 associates with that functionality was not identified as

02:52:02 8 this FIFO buffer unit that's identified in 57. It was --

02:52:06 9 they identified a completely different structure, Your

02:52:09 10 Honor.

02:52:09 11   So just the fact that in their joint claim

02:52:15 12 construction statement they're pointing to one thing, and

02:52:18 13 now in -- and now in their briefing, they're pointing to

02:52:20 14 another thing, I think highlights that we need -- that we

02:52:27 15 don't have guidance here. And whether these should be

02:52:31 16 increased or decreased is -- are questions that can't be

02:52:34 17 answered based on the intrinsic evidence.

02:52:38 18   Thank you, Your Honor.

02:52:39 19   THE COURT: All right. Well, let me say this just

02:52:41 20 for clarification. It's not that the Court doesn't like to

02:52:44 21 hear how other claim language is structured in an argument

02:52:48 22 as to how specific language then before the Court should be

02:52:49 23 structured. I just don't think it's always determinative.

02:52:52 24   You know, I can say one thing in one context and

02:52:56 25 say the same thing in another context, and the way that I

02:53:02   1   said it the first time shouldn't constrain the way I say it

02:53:05   2   the second time as long as I'm saying the same thing in two

02:53:09   3   different ways.

02:53:10   4   So it -- it's informative to some extent. I just

02:53:15   5   don't think it's an overly compelling argument. But it

02:53:18   6   doesn't have anything to do with whether I like or don't

02:53:20   7   like to do it. That was my only observation.

02:53:23   8   All right. This -- this will complete argument on

02:53:26   9   this claim term.

02:53:28   10   And, counsel, we're going to move on to the '505

02:53:32   11   patent, but before we do that, we're going to take a

02:53:36   12   10-minute recess.

02:53:37   13   I've got 2:53 Central Time on the clock on the

02:53:41   14   bench. So at 3:03, we're going to reconvene. If you will

02:53:49   15   watch your clocks accordingly. And I would suggest you

02:53:53   16   simply mute your devices but stay connected, and in 10

02:53:57   17   minutes, I'll be back, and we'll continue, as I say, with

02:54:00   18   the '505 patent.

02:54:03   19   The Court stands in recess.

03:05:12   20   (Recess.)

03:05:13   21   THE COURT: All right. Counsel, we'll reconvene

03:05:16   22   the claim construction hearing in the Huawei versus Verizon

03:05:19   23   matter. It's been recessed the past few minutes.

03:05:23   24   And we'll turn next to the '505 patent, and I'll

03:05:31   25   hear argument first on "optical channel data tributary unit

03:05:38 1 frame" and "ODTU frame" from Claims 1 through 4 of the

03:05:50 2 '505.

03:05:50 3   Let me hear from Huawei on this first, please.

03:05:55 4   MR. HAMAD: Thank you, Your Honor. Hamad Hamad

03:05:59 5 for Huawei.

03:06:02 6   Your Honor, would the Court allow me to clarify

03:06:04 7 one thing on the record with respect to the last -- the

03:06:07 8 last term for the '236?

03:06:10 9   THE COURT: I don't have a problem with that,

03:06:12 10 Mr. Hamad, but for one -- some reason, I'm not seeing you.

03:06:15 11 Are you signed in fully? I hear you. I don't see you.

03:06:20 12   MR. HAMAD: Yes, Your Honor. Let me try this.

03:06:30 13   THE COURT: There you are. What's your

03:06:33 14 clarification?

03:06:33 15   MR. HAMAD: With -- with respect to the passage of

03:06:34 16 the specification cited on our Slide 57, I had a docket

03:06:37 17 citation for Your Honor to our JCCS where the relevant part

03:06:43 18 of that specification is -- is cited in our JCCS. And that

03:06:47 19 is Docket No. 59-2, the file stamp Page 19.

03:06:54 20   And the -- the column line numbers that are cited

03:06:58 21 there are 15:56 to 16:9.

03:07:05 22   And the part that is in Slide 57 starts at 15:48,

03:07:10 23 basically where I started reading: If the monitoring

03:07:13 24 module 106. That comports entirely with what was cited in

03:07:18 25 our JCCS.

03:07:18 1   And that was it, Your Honor.

03:07:19 2   THE COURT: Well, let's go to the disputed claim

03:07:24 3 language from the '505. Let me hear from you first,

03:07:27 4 please, on behalf of Huawei.

03:07:28 5   MR. HAMAD: Thank you, Your Honor.

03:07:30 6   I'm on Slide 70. And with respect to this term,

03:07:37 7 the ODTU frame, Verizon's proposal wants to define it with

03:07:44 8 respect to the 2009 version of the G.709 standard. The

03:07:44 9 dispute between the parties is whether the claim

03:07:51 10 encompasses one of the two structures that are discussed in

03:07:53 11 that standard. The standard refers to two types of

03:07:57 12 structures, ODTUjk and ODTUk.ts.

03:08:04 13   Huawei's position is that while no construction is

03:08:07 14 necessary, we would like a clarification that the claim

03:08:10 15 would not encompass the "jk" structure.

03:08:15 16   I'm now on Slide 71, which shows this claim

03:08:21 17 element kind of in context with other pieces of Claim 1.

03:08:26 18   The claim recites mapping information of the

03:08:29 19 quantity of n-bit data units of the client signal to an

03:08:37 20 overhead of a first Optical Channel Data Tributary Unit

03:08:38 21 (ODTU) frame.

03:08:38 22   The issue is that the ODTUjk structure has an

03:08:42 23 overhead that does not have a Cbyte or a Cn byte field that

03:08:47 24 gives you the space to put that information. An analogy

03:08:50 25 would be having a claim that recites a box, and there are

03:08:53 1 two types of boxes. One has -- you can open it, it has

03:08:58 2 space inside. And the other is like a solid box.

03:09:00 3   And the claim also recites fill the box with

03:09:03 4 water, and then you would have one party insisting that you

03:09:05 5 could fill the solid box with water.

03:09:07 6   And referencing the spec -- the standard on Slide

03:09:13 7 72, you can see discussion with respect to the ODTUjk

03:09:22 8 overhead. It describes JC, N -- NJO, and PJO overhead

03:09:27 9 types, but it does not describe Cn or Cm information. That

03:09:27 10 would go in a Cbyte field or a Cn byte field.

03:09:34 11   In contrast, the ODTUk.ts structure in this

03:09:39 12 particular excerpt, it references the GMP Cm, as in micro,

03:09:43 13 information. There are other disclosures for the GMP Cn,

03:09:43 14 as in Nancy, parameter.

03:09:51 15   And Huawei submitted expert testimony on this

03:09:52 16 point, and this is on Slide -- depicted on Slide 73. And

03:10:00 17 this expert testimony from Dr. Bortz on this particular

03:10:03 18 point has gone unrebutted. Verizon's expert has submitted,

03:10:08 19 to be sure, other testimony on this claim term but not on

03:10:11 20 this point.

03:10:12 21   So with respect to the question of would it be --

03:10:16 22 I guess the question of -- resolving the factual question

03:10:16 23 of what structure a POSITA would have understood to be

03:10:21 24 encompassed by the claim term --

03:10:21 25   THE COURT: Slow down -- slow down, counsel.

03:10:24   1   MR. HAMAD: Yes, Your Honor. Thank you.

03:10:25   2   Let me try that one again.

03:10:29   3   So with respect to the evidence in the record on

03:10:33   4   resolving the factual question of what structures a POSITA

03:10:37   5   would have understood to be encompassed by the claim term,

03:10:40   6   there -- there is nothing else on this particular point.

03:10:44   7   So we would submit that the Court reject Verizon's

03:10:48   8   proposal. If the Court's not inclined to expressly

03:10:51   9   construe the term as -- as not including the ODTUjk

03:10:56   10 structure, we would be fine with no construction being

03:11:00   11 necessary, given the understanding that the other claim

03:11:03   12 elements would govern whether the ODTUjk structure would be

03:11:08   13 able to -- to meet or practice the claim.

03:11:11   14   Thank you, Your Honor.

03:11:13   15   THE COURT: Let me ask you this, Mr. Hamad.

03:11:16   16   MR. HAMAD: Yes, Your Honor.

03:11:18   17   THE COURT: Cutting through all the slides and all

03:11:21   18 the argument and all the clutter, it seems like to me what

03:11:25   19 Huawei is asking the Court do -- to do here is to adopt a

03:11:30   20 negative construction to foreclose a -- an invalidity

03:11:35   21 defense.

03:11:37   22   Tell me if that's really at the end of the day

03:11:40   23 what you're asking me to do and why should I do it.

03:11:42   24   MR. HAMAD: Yes, Your Honor, we are asking for a

03:11:45   25 negative limitation. And the reason it should be done is

03:11:49 1   that as a technological matter, that structure would be

03:11:52 2   incompatible with the remaining claim elements.

03:11:54 3   THE COURT: I mean, whether the ODTUjk can or

03:11:58 4   can't accommodate Cn bytes, isn't that really a factual

03:12:03 5   issue for the jury and not a claim construction issue for

03:12:05 6   the Court at this juncture?

03:12:06 7   MR. HAMAD: It could be -- it could be submitted

03:12:12 8   to the jury, Your Honor, yes. And that's -- that was my

03:12:15 9   conclusion. If the Court is not inclined to -- to construe

03:12:19 10   it, we're fine with no construction of this term.

03:12:21 11   We -- I guess we -- we're foreseeing this -- this

03:12:28 12   becoming an issue as early as expert reports. And if

03:12:32 13   there's going to be, you know, prior art that is said to --

03:12:34 14   to read on this, we anticipate the parties are going to

03:12:38 15   dispute this particular issue, whether the -- the JK

03:12:41 16   structure can receive that information when it does not

03:12:44 17   have this field.

03:12:46 18   It -- if there's the understanding that those

03:12:48 19   other elements would govern this with respect to meeting

03:12:51 20   that claim as a whole, then -- then I agree with Your Honor

03:12:54 21   and -- and would submit that no construction is necessary,

03:12:57 22   in that -- in that event.

03:12:59 23   THE COURT: It seems like to me that Huawei wants

03:13:01 24   the Court to find that ODTU does not encompass ODTUjk to

03:13:10 25   foreclose this invalidity challenge, and Verizon wants me

03:13:14   1   to affirmatively find that ODTU does encompass ODTUjk to

03:13:23   2   support their invalidity challenge.

03:13:26   3   And I guess my question to both of you, and I'll

03:13:29   4   ask Mr. Verhoeven to weigh in on this when he argues for

03:13:33   5   Verizon, why should the Court take either side of this

03:13:36   6   issue at this juncture in claim construction?

03:13:43   7   Let me hear -- let me hear from Mr. Verhoeven on

03:13:45   8   behalf of Verizon, please.

03:13:47   9   MR. VERHOEVEN: Thank you, Your Honor.

03:13:47 10   This is another term where both sides -- well,

03:13:54 11   before I start, Your Honor, if Your Honor could direct your

03:13:58 12   attention to the '505 slides for Verizon, and we'll start

03:14:04 13   on Slide 5.

03:14:09 14   So on this slide, I put up the declarations from

03:14:13 15   both the expert -- claim construction experts from both

03:14:15 16   sides, and they both state that it's Section 19.2 and

03:14:25 17   that's where this term comes from, Section 19.2 of the

03:14:28 18   standard.

03:14:28 19   Our construction is -- proposed construction is

03:14:31 20   simply to say it's defined in the standard in Section 19 --

03:14:35 21   19.2. We're not excluding something or adding something.

03:14:42 22   We're just referring to where the standard says OT -- ODTU

03:14:47 23   definition, Your Honor. And that a person of ordinary

03:14:50 24   skill in the art would look to that to ascertain whether

03:14:55 25   it's ODTU within the standard.

03:14:57 1   And because this has meaning only in the standard,

03:15:03 2 it's -- it's not like a term that you can take out -- out

03:15:08 3 of context.

03:15:09 4   So that's our position. And if you look at this

03:15:15 5 slide, this is a slide in the current G.709 standard, Your

03:15:20 6 Honor, and provides two different types of ODTUjk and ts.

03:15:25 7   Here we have a situation where not only is Huawei

03:15:33 8 arguing that a future ODTUk -- future definition, which is

03:15:41 9 ODTUk.ts -- not only that should be encompassed in the

03:15:47 10 definition, which didn't exist at the time of the patent,

03:15:51 11 only the jk definition existed. And that's just not --

03:15:57 12 and -- and on top of that, to exclude the ODTUjk which was

03:16:03 13 disclosed at the time of the filing, and that would be

03:16:08 14 inappropriate, Your Honor.

03:16:10 15   If you look at the '505 patent -- now I'm on Slide

03:16:14 16 6 -- citing to Column 1, Lines 53 through 63, it talks

03:16:22 17 about the G.709 recommendation defines an Optical Channel

03:16:29 18 Payload Unit-k tributary slot and an Optical Channel

03:16:35 19 Tributary Unit j into k.

03:16:38 20   And so the patent itself refers to ODTU j to k

03:16:44 21 as -- as an OPUk.ts -- oh, I'm sorry, as an ODTU.

03:16:54 22   And so they're arguing that the thing they even

03:16:56 23 cite for themselves in the specification as an example

03:16:59 24 should be excluded. We don't think that's appropriate,

03:17:02 25 Your Honor.

03:17:02 1   This next slide, Slide 7, is simply a timeline so

03:17:08 2 Your Honor can see.

03:17:09 3   In 2003, there -- there was the 2003 standard,

03:17:14 4 Your Honor. And back then, the definition of ODTU was just

03:17:18 5 ODTUjk. That's it. So that was the standard that existed

03:17:24 6 in April of 2007 when the patent was filed, only ODTUjk.

03:17:33 7   And the standard -- the new standard which

03:17:37 8 included both jk and k.ts didn't even come out until 2009,

03:17:46 9 a couple years after the patent was filed. And so we think

03:17:51 10 it would be inappropriate to construe ODTU in the abstract.

03:17:55 11 It's a defined term. It's -- it's -- the patent itself

03:17:59 12 references the standard. The standard existed at the time,

03:18:02 13 including ODTUjk, so we shouldn't exclude that.

03:18:07 14   But there -- there needs to be some -- some

03:18:09 15 construction, and the construction we submitted should

03:18:13 16 refer to the section in the standard which provides the

03:18:15 17 definition.

03:18:15 18   THE COURT: All right. Mr. Hamad, do you have

03:18:22 19 anything in a slower speed to offer?

03:18:24 20   MR. HAMAD: Yes, Your Honor.

03:18:33 21   So referring to the Column 1 specification cite,

03:18:36 22 so that's describing -- that's the patent, the '505 patent,

03:18:41 23 describing the then existing ODTU structure.

03:18:44 24   But the patent is describing improvements to that

03:18:47 25 structure that would encompass the ODTUk.ts. And I don't

03:18:51 1   think the parties dispute that it would encompass that.

03:18:54 2   And so on the ODTUjk, our point is simply that

03:18:58 3   there is other claim language that is not being read in

03:19:01 4   conjunction with this particular term when you're looking

03:19:05 5   at Verizon's proposal that makes it to where it didn't make

03:19:08 6   sense.

03:19:09 7   But, again, like I mentioned, we're -- we're okay

03:19:11 8   taking this up as a factual matter with experts and the

03:19:16 9   jury and -- and just not having it construed.

03:19:19 10   THE COURT: All right. I think I understand your

03:19:21 11 position.

03:19:26 12   Excuse me.

03:19:26 13   All right. Let's go next to "n-bit data units"

03:19:42 14 and "n indicating the number of the multiple OPUk TSs,"

03:19:48 15 again, from the '505 patent.

03:19:50 16   And let me hear from Verizon first on this,

03:19:54 17 please.

03:19:54 18   MR. VERHOEVEN: Thank you, Your Honor.

03:19:55 19   This is a situation where the claim uses "n" as a

03:19:59 20 part of the formula in the actual claim. And we're simply

03:20:04 21 asking the Court to confirm that "n" means the same thing

03:20:08 22 throughout the -- throughout the individual claim element

03:20:11 23 in them.

03:20:16 24   And apparently, Huawei's position is that not only

03:20:19 25 should you not do that, that there should be a construction

03:20:21 1   that n-bit data unit, "n" means something different than

03:20:28 2   the "n" that's used later in the construction, which

03:20:34 3   there's -- there's just no support for that.

03:20:36 4   Here's a claim -- I'm on Slide 19, Your Honor, of

03:20:41 5   my slides for the '505 patent, and we're showing Claim 2.

03:20:48 6   And you can see that "n" is used in the claim.

03:20:53 7   It's the same "n." And as a matter of claim construction,

03:20:55 8   Your Honor, terms that are used in the claim have the same

03:21:00 9   meaning. Same term is used, then the presumption is they

03:21:04 10 have the same meaning.

03:21:06 11   And there's no reason why "n" could not be the

03:21:08 12 same for both -- for all the places indicated here. The --

03:21:15 13 the technology would work just fine. And this is claiming,

03:21:20 14 in our view, that -- that the "n" is the same for the bits

03:21:28 15 of data units as it is for the number of TSs, Your Honor.

03:21:33 16   And to interpret it differently would be

03:21:38 17 inconsistent with claim construction rules and unfair to a

03:21:41 18 person of ordinary skill in the art who normally would --

03:21:44 19 would understand that you're talking about some sort of

03:21:47 20 calculation or determination and you use a variable -- a

03:21:52 21 constant letter variable that that -- that refers to the

03:21:56 22 same thing each time in the equation.

03:21:58 23   And this is simply set forth in claim construction

03:22:01 24 language. It's the same thing. It uses "n" both for --

03:22:05 25 for the number of bit data units and the same "n" for --

03:22:13   1   when it's talking about the OPUk TSs.

03:22:18   2   And so we're simply asking the Court to confirm

03:22:20   3   that "n" means the same thing throughout.

03:22:23   4   THE COURT: Let me -- let me ask a question for

03:22:26   5   clarification, Mr. Verhoeven. And it might be helpful for

03:22:28   6   you to look at Claim 2 of the '505 patent in Column 17.

03:22:36   7   If you look at Claim 2, you see several elements

03:22:43   8   of the claim that begin with mapping information or

03:22:47   9   mapping. There's mapping --

03:22:49   10   MR. VERHOEVEN: Right.

03:22:50   11   THE COURT: -- information, there's mapping the

03:22:53   12 n-bit data, and there's mapping each byte. And then if you

03:22:56   13 look at the very end of that last element that begins

03:23:02   14 "mapping each byte," you have "n indicating the number of

03:23:07   15 multiple OPUk TSs."

03:23:09   16   MR. VERHOEVEN: Right.

03:23:09   17   THE COURT: Are you -- are you asking -- and this

03:23:12   18 is where I need your clarification -- are you asking me to

03:23:14   19 take that last phrase, "n indicating the number of the

03:23:17   20 multiple OPUk TSs," and let that apply within that last

03:23:26   21 element that begins "mapping each byte," or are you

03:23:30   22 suggesting that it should be applied throughout every

03:23:33   23 element of Claim 2, or are you suggesting that it should be

03:23:36   24 applied throughout every claim of the '505 patent where

03:23:41   25 this language is used?

03:23:43   1   Try -- can you clarify the scope of what you're

03:23:45   2   telling me or arguing the application should be?

03:23:48   3   MR. VERHOEVEN: Your Honor, it's the second of

03:23:51   4   your three listed options. It's that -- this is a

03:23:56   5   definition provided in the claim itself. And it's --

03:24:01   6   it's -- the plain meaning of this is it's saying that the

03:24:05   7   number of OPUk TSs is the same as the n-bit data units

03:24:10   8   because they use the same "n."

03:24:12   9   THE COURT: Well, let -- let me ask this then. If

03:24:15 10   the last phrase of this last element or the last mapping

03:24:20 11   element, "n indicating the number of the multiple OPUk

03:24:27 12   TSs," if that's to apply throughout Claim 2 and not just to

03:24:31 13   this element within Claim 2, why is it not offset as a

03:24:37 14   separate element? Why is it embedded into this particular

03:24:42 15   element if it's to be applied outside of that particular

03:24:45 16   element?

03:24:46 17   Doesn't the -- the presentation of it as a phrase

03:24:51 18   at the end of that element and as a part of that element

03:24:55 19   indicate its application should be limited to that element?

03:25:00 20   That's my question.

03:25:02 21   MR. VERHOEVEN: I understand, Your Honor. And,

03:25:05 22   obviously, we don't draft the patents -- claims. The --

03:25:09 23   Huawei's patent counsel did. But I understand what you're

03:25:13 24   saying, Your Honor. The claim could be clearer.

03:25:17 25   But, you know, there could be a hard return there

03:25:24 1 instead of a comma to make it even more clearer, Your

03:25:28 2 Honor. But this is -- this is where the claim says what

03:25:30 3 "n" means, and there's no indication that it's saying it

03:25:33 4 only means it for one of the elements, Your Honor. It's

03:25:40 5 using it throughout the claim.

03:25:42 6   And I think a person of ordinary skill in the art,

03:25:44 7 if you're doing some sort of calculation and you're using

03:25:49 8 an "n," would assume that the ordinary practice of "n"

03:25:53 9 meaning the same variable would apply.

03:25:56 10   I'm not sure, Your Honor, if you can hear me.

03:25:58 11   THE COURT: I hear you fine.

03:25:59 12   MR. VERHOEVEN: Okay. My screen froze. That's

03:26:10 13 all.

03:26:10 14   So that -- that -- that's what I would argue, Your

03:26:13 15 Honor. They -- that might be an argument you could make,

03:26:13 16 but it's not clear from the claim. And the claim itself

03:26:15 17 says "n indicates a number of multiple OPUk TSs?" And it's

03:26:20 18 the same "n" throughout the claim.

03:26:22 19   So what do we do if it's not the same "n"? You

03:26:26 20 know, it's -- they should have called -- if they wanted it

03:26:30 21 to be different, they should have called it a different

03:26:32 22 label than the same "n," because it's -- if they meant

03:26:36 23 something different. It's incredibly confusing.

03:26:39 24   THE COURT: All right. Let me hear Huawei's

03:26:41 25 response, Mr. Hamad.

03:26:42   1   MR. HAMAD: Thank you, Your Honor.

03:26:47   2   Let me start on Slide 76 of my presentation.   And

03:26:52   3   our position is essentially what -- what Your Honor

03:26:57   4   articulated, which is that the "n" in the n-bit data units

03:27:02   5   and those first three elements shown on the slide, that has

03:27:05   6   one meaning that -- that relates to the n-bit data units.

03:27:10   7   But when you get to that last mapping each byte of

03:27:10   8   the second OTN frame, when you get to that last block

03:27:17   9   element, the "n" in that claim element (beeping) to the

03:27:23   10 number of OPUk TSs, and it could be different.

03:27:27   11   And shown on Slide 77, it is a general, you know,

03:27:32   12 principle that -- that we try to have consistency with

03:27:36   13 respect to claim terms, but it's not a hard and fast rule.

03:27:39   14 And the Federal Circuit has explained in particular that

03:27:41   15 the same claim term can have different constructions

03:27:44   16 depending upon the context of how that term is used within

03:27:46   17 the claims and specification.

03:27:49   18   And in this Aventis case, the term "substantially

03:27:55   19 pure" was construed to have different meanings, depending

03:28:00   20 on whether it was used to refer to an intermediate product

03:28:01   21 or end product.

03:28:03   22   And here we have an analogous scenario where we

03:28:06   23 have different context in both the claims, as -- as Your

03:28:08   24 Honor pointed out with the claim structure, but also with

03:28:12   25 the specification.

03:28:13 1   So on Slide 78, what we're showing is Dr. Bortz's

03:28:17 2   declaration where he identifies examples in the

03:28:21 3   specification of where the same placeholder variable "n" is

03:28:24 4   used to refer to different things.

03:28:26 5   So n-bit to describe the number of bits in a data

03:28:30 6   unit, "n" to describe the number of TSs in an OPUk, and "n"

03:28:34 7   to denote the multi-frame in Figure 6.

03:28:36 8   And the other thing I guess I want to point out is

03:28:41 9   "n" is not a stand-alone claim term even. It's -- it's

03:28:44 10 used within the claim terms that Verizon identifies,

03:28:48 11 and the -- the construction or the proposal that Verizon

03:28:51 12 has where it's going to be the same across terms doesn't

03:28:55 13 account for the remainder of the claim term or the claim

03:28:58 14 language.

03:28:58 15   And so on Slide 79, this is kind of what happened

03:29:02 16 in this Aventis case. The Federal Circuit noted that

03:29:05 17 separating the phrase "substantially pure" from the very

03:29:08 18 next word resulted in this artificial -- artificial

03:29:12 19 truncation that was error, and by decoupling the modifier

03:29:16 20 from the rest of the claim term, there ended up being a

03:29:19 21 single interpretation across different terms even though

03:29:22 22 the context suggested or required that there be separate

03:29:26 23 definitions.

03:29:27 24   And so on Slide 80, you just see the two terms

03:29:30 25 side-by-side. And the only aspect of those terms that is

03:29:34   1   being considered in this proposal is just that placeholder

03:29:38   2   variable.

03:29:39   3   So we -- we don't think that -- that Verizon's

03:29:42   4   proposal fits here, and we would respectfully request that

03:29:47   5   it be rejected.

03:29:49   6   THE COURT: All right. Anything further from

03:29:50   7   Verizon, Mr. Verhoeven, on this term?

03:29:54   8   MR. VERHOEVEN: Yes, just really briefly.

03:29:57   9   On the Aventis cite, this is not -- this is not

03:30:01 10   apposite to our case. The "n" is a variable. It's a math

03:30:04 11   term, and it's -- it's -- it's appropriate to have it

03:30:11 12   construed as to what the scope and bounds of that math term

03:30:15 13   is.

03:30:16 14   And any mathematician would tell you that if

03:30:20 15   there's an equation that uses a variable with a specific

03:30:24 16   letter and it uses that same letter in other places in the

03:30:28 17   calculation, that what that means is it's the same

03:30:34 18   variable, Your Honor. And that is what a person

03:30:38 19   of ordinary -- ordinary skill in the art would understand.

03:30:42 20   And looking at this claim, it -- it's using "n"

03:30:47 21   the same way -- it's using the same variable throughout the

03:30:52 22   claim. And whether they meant to or not, Your Honor -- and

03:30:55 23   I think they meant to -- the -- the person looking at this

03:31:01 24   is going to think "n" means the same thing, because in

03:31:06 25   math, when you use a letter to talk about a variable and

03:31:10 1 you use the same letter later, that's -- every

03:31:14 2 mathematician will tell you that's indicating the same

03:31:17 3 variable so --

03:31:18 4   THE COURT: Do you have --

03:31:20 5   MR. VERHOEVEN: I'm sorry.

03:31:20 6   THE COURT: Do you have a declaration from a

03:31:22 7 mathematician in support of that?

03:31:24 8   MR. VERHOEVEN: No, I don't, Your Honor.

03:31:27 9   THE COURT: Well, we liberal arts majors don't

03:31:32 10 necessarily know what all the mathematicians know.

03:31:36 11   MR. VERHOEVEN: Guilty as charged.

03:31:38 12   THE COURT: What else?

03:31:38 13   MR. VERHOEVEN: I just want to do -- can I do one

03:31:40 14 thing really quick before we move on, Your Honor, is I

03:31:43 15 wanted to show one more slide in my deck if I could, and I

03:31:46 16 think this relates to what we're talking about.

03:31:48 17   THE COURT: All right. Which slide?

03:31:50 18   MR. VERHOEVEN: It's Slide 22 -- 22.

03:31:52 19   So we're talking about -- you know, I guess we're

03:31:55 20 trying to get to what did the inventors want these things

03:31:58 21 to mean, as well as what does a person of ordinary skill

03:32:01 22 think.

03:32:02 23   And if you look at these two claims, the one on

03:32:05 24 the left is the '505, Claim 2, we've been talking about.

03:32:09 25 And the one on the right is the '431 patent which is a

03:32:15 1 continuation of the '505 patent, Your Honor. And you can

03:32:22 2 see here they -- they chose to use "m," not "n" -- "m" as

03:32:22 3 in man, not "n" as in Nancy, to describe the data units in

03:32:25 4 this particular claim. And then the Dependent Claim 3 uses

03:32:30 5 a different variable "n" to indicate the quantity of the

03:32:36 6 multiple TSs.

03:32:36 7   So that's a claim where they could do certain

03:32:39 8 things, but that stands in sharp contrast to Claim 2 of the

03:32:43 9 '505 patent where they used "n" throughout.

03:32:45 10   Hat and the continuation demonstrates the

03:32:47 11 inventors knew how to use a different variable when they

03:32:50 12 wanted to by indicating it with a different letter.

03:32:55 13   That's all I have, Your Honor.

03:32:56 14   THE COURT: All right. Thank you, counsel.

03:32:58 15   Let's -- let's transition to the '253 patent. And

03:33:03 16 I'll take up the "judging," "judge," "determining whether"

03:33:12 17 terms from Claims 1, 4, and 6 and 9 and 14 of the '253

03:33:12 18 patent.

03:33:21 19   It looks like in this particular scenario that

03:33:25 20 Huawei says these are so clear that no construction is

03:33:28 21 necessary. And Verizon says at least alternatively that

03:33:31 22 they're so unclear that they're indefinite. So I'll look

03:33:35 23 forward to your competing arguments.

03:33:37 24   And let's begin with Verizon's argument. Let me

03:33:39 25 hear from Verizon on these terms.

03:33:41 1   MR. WATKINS: Good afternoon, Your Honor. Brett

03:33:45 2   Watkins for Verizon. Can you hear me okay?

03:33:48 3   THE COURT: I can hear you just fine.

03:33:50 4   MR. WATKINS: Thank you.

03:33:50 5   And may I ask, do you have our slide deck for the

03:33:56 6   '253 patent handy?

03:33:57 7   THE COURT: I do. I can't see you, Mr. Watkins,

03:34:01 8   but I can hear you.

03:34:02 9   MR. WATKINS: Okay. My -- my camera button says

03:34:05 10   that it is turned on. So maybe I'll try and turn it off

03:34:09 11   and then back on. Okay. Can you hear me now, Your Honor?

03:34:14 12   THE COURT: I can hear you, and I can sort of see

03:34:17 13   you. You're kind of fuzzy, but go ahead.

03:34:21 14   MR. WATKINS: Okay. That's probably for the best

03:34:23 15   actually.

03:34:24 16   MR. VERHOEVEN: You're fuzzy.

03:34:28 17   MR. WATKINS: So I think, Your Honor, to address

03:34:29 18   these terms, and I think you noted that it is a group of

03:34:34 19   terms. These are limitations that -- that appear in each

03:34:39 20   of the dependent claims of the '253 patent. They raise the

03:34:42 21   same issue, so we've briefed them, and we'll argue them as

03:34:47 22   a group.

03:34:47 23   And I think it would help to sort of step back and

03:34:49 24   take a look at the '253 patent more generally and then

03:34:53 25   focus on those terms.

03:34:55   1   So if you could turn to Slide 4 from our slide

03:34:59   2   deck. We have a -- what's here basically is an overview of

03:35:07   3   what -- what the '253 patent is disclosing as the claimed

03:35:11   4   invention. And I'll paraphrase the -- the part that we've

03:35:17   5   excerpted from the patent, but Figure 5 shows it. It's

03:35:21   6   basically -- it's a -- it's a ring of ethernet nodes

03:35:24   7   labeled in this Figure A through F.

03:35:28   8   And what happens is when there is a break or a

03:35:33   9   fault in a link between two of the nodes, those two nodes

03:35:36   10 that are adjacent to the link that's failed will send out

03:35:39   11 a -- it's called a false message.

03:35:43   12   In the figure, it says AIS. That's one embodiment

03:35:48   13 of the fault message that's disclosed in the patent, and so

03:35:50   14 they'll send those to the other nodes in the network to

03:35:52   15 inform them that there's been a failure.

03:35:54   16   So I guess the point that I'd like to get across

03:35:57   17 here is that each of these other nodes, for example, Node

03:36:01   18 A, will receive two different messages. It will receive

03:36:05   19 one from Node D, and then it will receive another one from

03:36:08   20 Node E that comes all the way around the other side of

03:36:11   21 the -- the ring.

03:36:12   22   And so with that in mind, I'd like to turn to the

03:36:17   23 language of Claim 1 so we can look at the disputed claim

03:36:21   24 language, and that's on Slide 6 of our presentation.

03:36:26   25   You'll see Claim 1, the way it's set up -- it

03:36:30   1   says: A ring protection method -- and then it says -- and

03:36:33   2   I'm going to paraphrase again, but it says: Detecting, by

03:36:36   3   a first node, that there's been a link fault, blocking the

03:36:42   4   port connected to that link fault, and then sending a fault

03:36:47   5   alarm message to other nodes, and where that fault alarm

03:36:51   6   message includes an identifier that indicates the node that

03:36:51   7   detected the fault.

03:36:54   8   And the other nodes, when they receive the

03:36:57   9   message, will judge whether that identifier has -- is

03:37:00   10   different from one -- a fault identifier record. And then

03:37:06   11   if it is different, they will store the new identifier and

03:37:13   12   clear the forward.

03:37:15   13   And so I guess the point here is to notice that

03:37:18   14   the claim itself is really focused on the instance of the

03:37:21   15   one message going around the ring. It doesn't -- it

03:37:23   16   doesn't claim, you know, what happens in response to both

03:37:27   17   messages that are shown in Figure 5. It's really just

03:37:29   18   focused on what a node does when it detects a fault and

03:37:35   19   what another node does when it receives that message

03:37:38   20   received from the one that detected the fault.

03:37:42   21   So it's sort of -- it's -- I would say Claim 1 and

03:37:45   22   the other claims that are identified in the -- claim --

03:37:48   23   recited in the '253 patent are really focused on sort of a

03:37:53   24   subset of the functionality of the overall protocol.

03:37:55   25   And so, you know, if we have focused on the

03:38:00   1   limitation that's disputed by the parties, it says:

03:38:05   2   Judging by a second node -- and this is in relation to

03:38:08   3   Claim 1. It's similar in the other claims, with some

03:38:12   4   slight tweaks to the claim language, but it's the same

03:38:15   5   basic functionality that's recited. It says: Judging by a

03:38:18   6   second node which receives the fault alarm message whether

03:38:22   7   the identifier contained in the fault alarm message is

03:38:26   8   different from a fault identifier record stored in the

03:38:30   9   second node.

03:38:30   10   So I think a person of ordinary skill in the art

03:38:34   11   reading this claim would -- would wonder a few things.

03:38:40   12   They would say, okay, what is the identifier contained in

03:38:42   13   the fault alarm message? What is the fault identifier

03:38:45   14   record that's stored in the second node? And how do I

03:38:48   15   determine whether they are different? That's the gist of

03:38:52   16   the judging and determining limitations.

03:38:54   17   If you are -- if Your Honor would, I guess, stay

03:38:57   18   on this slide, Slide 6, the first question: What is the

03:39:04   19   fault identifier -- the identifier, sorry, contained in the

03:39:07   20   fault alarm message? That's actually answered in the

03:39:10   21   previous limitation which says that the fault alarm message

03:39:12   22   contains an identifier that indicates the first node

03:39:18   23   detecting the link fault.

03:39:20   24   So that's going to be, for example, in the

03:39:21   25   specification, the one example it provides is the source

03:39:24   1   address of the node that detected the link fault, but it's

03:39:27   2   basically something that identifies that node.

03:39:29   3   So that's -- that's what the identifier is.

03:39:32   4   The next question would be: What is a fault

03:39:35   5   identifier record?

03:39:38   6   So if Your Honor would turn to Slide 9 from our

03:39:47   7   presentation.

03:39:48   8   As I mentioned before, the -- the patent -- the

03:39:51   9   basic setup of the protocol that's described in the patent

03:39:56 10   is that nodes send alarm messages in both directions around

03:40:02 11   the ring when there is a link fault that's detected. And

03:40:04 12   we provided some exemplary -- exemplary descriptions of

03:40:06 13   that on this slide.

03:40:07 14   On the following slide, Slide 10, we show that

03:40:12 15   there are -- the functionality that is also recited -- and

03:40:16 16   this is sort of common through all of the embodiments

03:40:19 17   described in the specification -- is that each node they

03:40:23 18   maintain a fault identifier record, and that record

03:40:27 19   contains a pair of values, one for each of the nodes' two

03:40:33 20   ports.

03:40:34 21   So like I said before, the -- in the normal

03:40:37 22   situation, the nodes that detect a link fault will send a

03:40:41 23   fault alarm message around the ring. That means each other

03:40:43 24   node will receive two different messages with two different

03:40:47 25   identifiers. They're going to save both of those, and

03:40:50 1 they're going to use those to determine whether to clear

03:40:55 2 the forwarding table.

03:40:56 3   So in the situation that's recited in Claim 1

03:41:00 4 which relates to one message going around the ring, it

03:41:03 5 really relates to determining whether the fault identifier

03:41:09 6 that's stored for that port has changed.

03:41:12 7   And so that's -- I think the gist of our proposed

03:41:17 8 construction is that it reflects the fact that Claim 1 is

03:41:19 9 really directed toward the subset of the functionality

03:41:23 10 which is one node -- or, sorry, one message sent by one

03:41:25 11 node, received by another node, and how that -- that second

03:41:29 12 node will determine if the received identifier, which is

03:41:33 13 one value, is different from the values that are stored

03:41:37 14 within the node that receives it, which could be two

03:41:40 15 values.

03:41:41 16   And how does it determine that those are

03:41:43 17 different? I think there's some ambiguity there. It's --

03:41:45 18 you know, how do you compare and determine whether one

03:41:47 19 value is different from two values?

03:41:50 20   I think the specification indicates that you do it

03:41:53 21 one way. You compare that one value to the value -- the

03:41:58 22 one value in the pair that corresponds to the same port on

03:42:02 23 which the message was received.

03:42:04 24   And -- and that's actually reflected consistently,

03:42:12 25 like I said, throughout the specification. We've produced

03:42:15   1   some -- on the following slide, Slide 11 of our

03:42:23   2   presentation, we produced some -- provided some excerpts

03:42:26   3   and underlining to indicate where we see this in the

03:42:30   4   specification, but it's consistent. It's -- you know,

03:42:33   5   when -- and -- and I'd like to note that the specification

03:42:38   6   actually uses slightly different language. It doesn't say

03:42:41   7   do you determine that the received identifier is different

03:42:43   8   from the stored identifier?

03:42:45   9   It actually uses language like -- so, for example,

03:42:51 10   in Column 6, it says: The mode of the -- of detecting

03:42:55 11   change of the fault identifier is judging whether the

03:42:59 12   source address of the MS message received by the

03:43:02 13   corresponding port in the fault table is changed.

03:43:08 14   So it -- it actually doesn't use the word

03:43:13 15   "different" to describe how this functionality works in the

03:43:16 16   specification. It -- it says: Determining whether the

03:43:18 17   fault identifier is changed.

03:43:19 18   In the context of the claims, I think a person of

03:43:22 19   ordinary skill in the art would understand that to mean

03:43:24 20   that the fault identifier for that port is compared to the

03:43:28 21   one that's received. And if it's different, then the node

03:43:33 22   determines that it's changed, and it will go on and clear

03:43:37 23   the forwarding table.

03:43:38 24   And with that, I'll turn it over to counsel for

03:43:42 25   Huawei, or if Your Honor has any questions, feel free to

03:43:46 1 jump in.

03:43:47 2   THE COURT: Thank you, Mr. Watkins.

03:43:50 3   Let me hear from Huawei's counsel on these terms.

03:43:57 4   MR. WALDROP: Thank you, Your Honor. Alex Waldrop

03:43:58 5 for Plaintiff, Huawei.

03:43:59 6   As an initial matter, I think counsel made the

03:44:05 7 argument that the independent claims here are directed to

03:44:12 8 the subset of the functionality described in the patent

03:44:16 9 specification. I think that's improper and incorrect, and

03:44:20 10 it's a -- what is -- what I think is -- he's doing -- or

03:44:25 11 counsel is suggesting that there is some negative

03:44:27 12 limitation because the claims don't recite the second

03:44:34 13 message -- second fault alarm message and doing something

03:44:38 14 with that second message.

03:44:40 15   But beyond that, the fundamental reason why

03:44:43 16 this -- why Verizon's proposal should be rejected is that

03:44:46 17 it's imposing a limitation and adding claim language to --

03:44:51 18 language to the claim that limits the claim to a specific

03:44:53 19 embodiment and excludes the more general scope of the

03:44:58 20 patent.

03:44:58 21   In particular, as shown in their slides, they're

03:45:03 22 pointing to a specific embodiment in which the fault

03:45:08 23 identifier record is a pair of source addresses. That is

03:45:10 24 not the only embodiment described in the patent. If you --

03:45:15 25 if you have our -- Huawei's claim construction slides in

03:45:21   1   front of you, I'd ask you to turn to Slide 87, which

03:45:26   2   includes several excerpts from the '253 patent

03:45:30   3   specification.

03:45:31   4   THE COURT: I have it in front of me.

03:45:33   5   MR. WALDROP: On the left -- oh, sorry, Your

03:45:35   6   Honor.

03:45:35   7   THE COURT: I have the slide in front of me.

03:45:37   8   MR. WALDROP: Thank you, Your Honor.

03:45:37   9   In looking to the excerpt on Slide 87 on the right

03:45:45 10   side, the patent even specifies -- uses permissive language

03:45:52 11   that the fault identifier may be a source address pair of

03:45:56 12   the fault alarm message received by two ports.

03:45:59 13   But it -- it further says that the fault

03:46:02 14   identifier may be something else. It may be an alarm

03:46:05 15   identifier information carried in the fault alarm message.

03:46:08 16   So -- so since the patent itself describes these

03:46:14 17   multiple embodiments, restricting the claim language by

03:46:18 18   adding the additional claim language and modifying the

03:46:21 19   claim language as Verizon suggests would be improper

03:46:23 20   because it would improperly limit the claim to a specific

03:46:28 21   embodiment to the exclusion of others.

03:46:32 22   THE COURT: All right. What else?

03:46:34 23   MR. WALDROP: Your Honor, I think that's

03:46:38 24   sufficient to reject the claim -- to reject their proposal,

03:46:45 25   and I don't think -- unless you have any further questions,

03:46:47 1 I think that's it for me.

03:46:50 2   THE COURT: Do you have any follow-up,

03:46:54 3 Mr. Watkins?

03:46:55 4   MR. WATKINS: Yes, just briefly, Your Honor.

03:46:56 5   So when I described the functionality recited in

03:46:59 6 Claim 1 and the other independent claims as a subset of the

03:47:03 7 functionality described in the patent, I didn't mean to

03:47:06 8 imply that it excludes other functionality. Certain --

03:47:10 9 certainly, the claims are not limited to a situation where

03:47:16 10 there's only one message being sent around on one direction

03:47:19 11 in the ring. I think -- like I said, the -- the overall

03:47:24 12 invention is about a system where you have messages going

03:47:27 13 in both directions.

03:47:28 14   So it was not my intention to indicate that the

03:47:32 15 claims are not trying -- the claims are excluding anything

03:47:35 16 in the specification.

03:47:36 17   And -- and as to Mr. Waldrop's point on Slide 87,

03:47:43 18 that excerpt that's cited there, it says: The fault

03:47:48 19 identifier may be a source address pair of the fault alarm

03:47:51 20 message received by two ports, and the fault identifier

03:47:55 21 may -- identifier may be alarm identifier information.

03:48:00 22   I think that reflects the fact that a source

03:48:03 23 address is one particular identifier that can be used.

03:48:10 24 There could be some other type of identifier. But Claim 1

03:48:14 25 specifically says that it's going to be an identifier

03:48:17 1 that -- make sure I'm not misquoting the language of the

03:48:22 2 claim -- the fault identifier is one that indicates the

03:48:27 3 first node detecting the link fault.

03:48:29 4   So that could be a source address. It could be

03:48:32 5 something else like an alarm identifier. So I don't think

03:48:35 6 it indicates that there are embodiments where there is

03:48:40 7 something other than a pair of values stored on each node

03:48:44 8 for the stored identifier information. I just don't see it

03:48:48 9 in the specification.

03:48:49 10   THE COURT: All right. Thank you, counsel, for

03:48:52 11 your arguments in regard to these disputed claim terms.

03:48:56 12   Let's turn next to the '111 patent. These are the

03:49:04 13 Verizon asserted patents, the '111 and '288.

03:49:11 14   And with regard to the '111, let's take up the

03:49:16 15 disputed language "wherein the first time stamp comprises

03:49:21 16 information reflecting a round trip delay of the network,"

03:49:25 17 and effectively our disputes here center around

03:49:28 18 "reflecting," "reflects," and "reflects."

03:49:33 19   And Huawei's asserted that this language -- or

03:49:37 20 these term -- these claims, rather, are indefinite.

03:49:41 21   Verizon's asserted that their plain and ordinary

03:49:44 22 meaning should apply.

03:49:47 23   Let me hear from Huawei first as to their position

03:49:50 24 on these claims.

03:49:51 25   MR. REICH: Your Honor, Seth Reich for Huawei.

03:49:57   1   THE COURT: Please proceed.

03:50:00   2   MR. REICH: Our slides on this start on 96 of our

03:50:03   3   deck.

03:50:04   4   And so the -- the terms -- they're all the

03:50:08   5   "reflect" terms are treated the same. And so the issue

03:50:11   6   here is that Verizon's plain and ordinary meaning, it's

03:50:16   7   ultimately the same proposal that they're taking with

03:50:18   8   respect to their alternative construction. And it's that

03:50:23   9   this term encompasses anything that is used to determine a

03:50:28   10 round trip delay later in the claims.

03:50:30   11   And -- and the issue with that is that this was

03:50:33   12 something that the prior art had, and they distinguished

03:50:38   13 over when actually adding this limitation. And when you

03:50:41   14 take that out, a person of ordinary skill looking at the

03:50:46   15 term in light of the prosecution history wouldn't know what

03:50:50   16 to do with this term. I mean, there is no reasonably

03:50:56   17 ascertainable scope in the term once we know that this

03:50:59   18 proposal that Verizon is making is not included.

03:51:05   19   And so if you look at Slide 97 that we have, we

03:51:09   20 have the -- the term itself in an exemplary claim.

03:51:14   21   And so here you see that the first time stamp

03:51:18   22 includes information that reflects a round trip delay of

03:51:23   23 the network, and this is in the first time stamp.

03:51:25   24   One of the issues with this is that this is -- if

03:51:29   25 we're going to take Verizon's proposal, it renders this

03:51:32 1 entire language superfluous, because the -- there's four

03:51:36 2 steps in this claim, as you can see on Slide 97.

03:51:40 3   The generating step indicates that this second

03:51:44 4 time stamp includes information from the first time stamp.

03:51:47 5 And then the fourth step, the transmitting step, says that

03:51:51 6 you use the second time stamp to measure the round trip

03:51:57 7 delay.

03:51:57 8   And so, in effect, what Verizon is trying to say

03:52:01 9 that the wherein the information reflects a round trip

03:52:05 10 delay term means is already included in the scope of the

03:52:09 11 claims by the fact that the second time stamp includes that

03:52:14 12 first time stamp information and that the second time stamp

03:52:17 13 is then used to measure the round trip delay, and so it's

03:52:20 14 already there.

03:52:20 15   Now, the key issue with that is the -- during the

03:52:26 16 prosecution, the examiner rejected these claims with the

03:52:29 17 other limitations in them over a combination that involved

03:52:35 18 a prior art reference called Edmison and -- and two other

03:52:40 19 references that were combined. And there's a series of

03:52:43 20 history that gets us to this, I think, key rejection and

03:52:47 21 then the amendment that comes after it which involves the

03:52:50 22 addition of the wherein the information reflects a round

03:52:53 23 trip delay term.

03:52:54 24   And so, you know, we put all the slides in here,

03:52:58 25 but just trying to cut to what's the most important one, if

03:53:04   1   you can skip to Slide 101. And here we have sort of the

03:53:11   2   ultimate, I guess, conclusion of the claim itself, which is

03:53:16   3   the -- on the left, we have the file history. I realize

03:53:19   4   it's rather small, but we have this in our brief, where the

03:53:22   5   examiner maps Edmison to the calculation of the round trip

03:53:28   6   delay or the measuring at the -- with the second time stamp

03:53:33   7   that the examiner identified in Edmison.

03:53:36   8   And what that is, is the second time stamp

03:53:38   9   includes this information T_{A2}, T_{A1}, T_{z2}, and T_{z1}. And what

03:53:45   10 that means is from the -- the box from -- on the right

03:53:48   11 side, the top box, which is from Edmison, Paragraph 50, and

03:53:52   12 it's source received time minus source transmission time

03:53:56   13 minus the destination delay time, which is that T_{z2} minus

03:54:02   14 T_{z1}, equals latency or round trip delay.

03:54:07   15   And the key point here is -- and we can see it if

03:54:11   16 we just go back one slide, and we can look at Edmison

03:54:14   17 Figure 4, is that time stamp -- the first time stamp that

03:54:20   18 the examiner identified in the Edmison reference is time

03:54:26   19 stamp 110 and includes that time T_{A1}.

03:54:31   20   And so the Edmison reference had information in

03:54:35   21 the first time stamp identified by the examiner that was

03:54:38   22 used in the calculation we just looked at on my Slide 101.

03:54:43   23 And that's all it is.

03:54:44   24   And so what happened next was that you can see it

03:54:49   25 on Slide 102 of our deck. The applicants amended the

03:54:53   1   claims to include this key limitation of wherein the

03:54:57   2   information reflects a round trip delay. That's on the

03:55:02   3   right. It's also from the file history at 294, and that's

03:55:05   4   both the Bates number and the page number because this was

03:55:08   5   the first exhibit produced by Verizon.

03:55:12   6   And what they said in response, after they made

03:55:15   7   this amendment, was that they respectfully submitted that

03:55:18   8   the portions of Edmison and the two other references, Ofek

03:55:22   9   and Fujimori, that were cited by the examiner did not

03:55:25   10 disclose this limitation.

03:55:26   11   What you cited does not meet this. And -- and

03:55:30   12 then the examiner allowed the claims as a result. But what

03:55:34   13 they're doing here now is they're precisely applying these

03:55:38   14 things -- this limitation, wherein the information

03:55:41   15 reflects -- reflects a round trip delay, on to prior art

03:55:47   16 that effectively would just apply to Edmison.

03:55:55   17   THE COURT: Let me ask you this.

03:55:59   18   MR. REICH: One of the -- okay.

03:55:59   19   THE COURT: Let me ask you this.

03:55:59   20   MR. REICH: Sorry, Your Honor.

03:56:00   21   THE COURT: You've told me a lot about what these

03:56:01   22 prior art references say, but what I'm looking for is for

03:56:05   23 you to show me some evidence of what Verizon intended to

03:56:12   24 surrender. Not what the reference says, but something that

03:56:16   25 indicates the intention to unequivocally surrender scope

03:56:21   1   that would give rise to the prosecution history estoppel

03:56:24   2   argument you're making.

03:56:26   3   MR. REICH: Yes.

03:56:28   4   THE COURT: Can you focus on that rather than just

03:56:30   5   what the prior art references may or may not include in

03:56:33   6   themselves?

03:56:35   7   MR. REICH: Certainly, Your Honor.

03:56:36   8   I think you would see it on 102. The key is that

03:56:40   9   after having the examiner point out all of this, that the

03:56:45 10   examiner had mapped every single element that I just talked

03:56:49 11   about. That's when Verizon said: What you mapped does not

03:56:52 12   meet our new limitation.

03:56:53 13   And so that is specifically on 304 of the file

03:56:58 14   history, the '111 patent file history, and it's where

03:57:01 15   they -- the applicant submits that the cited portions --

03:57:04 16   the cited portions which we just discussed do not meet this

03:57:08 17   limitation. And I -- I think that is the key because these

03:57:12 18   are portions all that were cited by the examiner.

03:57:17 19   I'll -- I'll address one of Verizon's counter

03:57:20 20   arguments to this on my Slide 103. It's addressing the

03:57:26 21   issue they raise on their Slide 10. They say that, oh,

03:57:29 22   they had another argument, so it's not clear, and it -- and

03:57:35 23   unambiguous, a disclaimer, that the round trip -- sorry,

03:57:42 24   the time T_{A1} was being updated. This is something that was

03:57:45 25   made in the file history, but it was made before this

03:57:47   1   critical rejection and this critical amendment, and I think

03:57:51   2   that's what's key.

03:57:52   3   We cited page numbers, but the -- the critical

03:57:58   4   rejection is on Page 252. And the critical language that

03:58:02   5   we're relying on for the disclaimer issue is on 304, at

03:58:06   6   which they did not make this argument. And this argument,

03:58:09   7   I think, is wrong. Just as an application of Edmison, the

03:58:14   8   examiner rejected it. And we can look at Edmison,

03:58:16   9   Paragraph 63, to show that time T_{A1} is the time of the

03:58:23   10 transmission, as the examiner recognized. It's not the

03:58:27   11 time that's being updated. It -- that wouldn't make the

03:58:30   12 calculation using time T_{A1} make sense. Edmison 50 and 65,

03:58:36   13 which the examiner relied on for that calculation to the

03:58:39   14 round trip delay, identified as the source transmission

03:58:42   15 time -- the time at node A at the time of transmission.

03:58:46   16   So the argument that Verizon is making now was

03:58:49   17 rejected by the examiner, and it wasn't made when they were

03:58:52   18 making the arguments against the cited portion on which

03:58:57   19 we're relying for the disclaimer.

03:58:59   20   So I think those are the key points. I'm happy to

03:59:02   21 talk about the file history or Edmison more, but those were

03:59:05   22 the key points that we wanted to make.

03:59:07   23   With respect to the indefiniteness, once we remove

03:59:10   24 what Verizon is arguing this term means, our expert talked

03:59:17   25 about how there's no other discernible scope.

03:59:21 1   And so I'd be happy to address any other

03:59:23 2 questions, but that's all we have.

03:59:25 3   THE COURT: All right. Thank you for your

03:59:26 4 argument.

03:59:26 5   Let me hear from Verizon's counsel on this.

03:59:29 6   MR. MACK: Thank you, Your Honor. Good afternoon.

03:59:33 7 This is Brian Mack.

03:59:34 8   Can you hear me?

03:59:39 9   THE COURT: I can. Please proceed.

03:59:43 10   MR. MACK: Thank you, Your Honor.

03:59:44 11   I think you spotted the issue here. There is no

03:59:48 12 clear disclaimer or disavowal in the file history. If we

03:59:51 13 just go back to Huawei's Slide 102 that counsel just

03:59:59 14 pointed us to, you can see here on the yellow highlight on

04:00:02 15 the left, the applicant's remarks in the file history

04:00:05 16 were -- were not just referencing Edmison. It was Edmison,

04:00:10 17 Ofek, and Fujimori. It wasn't just in connection with the

04:00:15 18 wherein limitation that was added. It says that those

04:00:16 19 references don't show the extracting clause with the

04:00:21 20 wherein limitation, and they also don't show the generating

04:00:24 21 clause.

04:00:25 22   So the references were actually distinguished on

04:00:27 23 multiple different grounds, not just the addition of this

04:00:30 24 wherein clause. And it wasn't -- and it looks like there's

04:00:32 25 a dispute between the experts and the parties on what the

04:00:35 1 Edmison reference does or does not disclose.

04:00:37 2   But even if you agree with everything that counsel

04:00:40 3 said, there's nothing in the file history that amounts to a

04:00:44 4 clear disclaimer or disavowal that would rise to the level

04:00:48 5 of prosecution history disclaimer.

04:00:50 6   I just -- I looked through all these slides, and I

04:00:53 7 just -- I just don't see it.

04:00:56 8   If you have Verizon's slides in front of you, we

04:00:59 9 did have one slide on the file history -- Verizon slides

04:01:02 10 for the '111 and '288 patent. If you turn to Slide No. 10,

04:01:09 11 our expert actually looked at the file history in a lot of

04:01:09 12 detail. He -- he notes that the Request for Pre-Appeal

04:01:16 13 Conference in the file history, Paragraph 72 of Dr. Min's

04:01:21 14 declaration. And he says that the Edmison reference was

04:01:25 15 actually distinguished on multiple different grounds, and

04:01:29 16 is quite dissimilar from the claimed invention. Then --

04:01:30 17 I'm sorry, was there a question?

04:01:31 18   THE COURT: No. Go ahead.

04:01:32 19   MR. MACK: And then in Paragraph 73, he actually

04:01:37 20 explains why the Edmison reference does not show a time

04:01:40 21 stamp that includes information reflecting a round trip

04:01:44 22 delay. And that's precisely what opposing counsel just

04:01:48 23 mentioned.

04:01:48 24   In Edmison, that T_{A1} value is overwritten by the

04:01:53 25 current network processor time. So there -- there is a T_{A1}

04:01:58   1   value in both the first and second time stamp. But it's

04:02:02   2   overwritten so that that value is no longer reflecting

04:02:05   3   round trip delay, it's not reflecting one -- the one-way

04:02:07   4   delay. It's a completely new value once it gets to the

04:02:09   5   destination.

04:02:10   6   Just -- just briefly, Your Honor, regarding the

04:02:15   7   scope of this claim, if you would -- if you could look at

04:02:18   8   Slide No. 5, Claim No. 1 is -- is pretty clear. It says

04:02:23   9   that the first time stamp -- there's information that's

04:02:27 10   extracted.

04:02:29 11   THE COURT: Mr. Mack, is this your Slide 5 or is

04:02:32 12   this -- or is this Huawei's Slide 5? You said Slide 5 --

04:02:38 13   MR. MACK: Yeah, if you could go to Verizon's

04:02:40 14   Slide No. 5 for the '111 and '288 patents. Do you have --

04:02:45 15   do you have that slide deck?

04:02:46 16   THE COURT: I do. I just wasn't sure which one.

04:02:47 17   You -- you all have been jumping back and forth between

04:02:50 18   each other's slides, so I just wanted to be sure I was

04:02:53 19   looking at the one you intended. Go ahead.

04:02:56 20   MR. MACK: To make it more confusing, I think we

04:03:00 21   renumbered our slides from 1 each patent, and I think

04:03:04 22   Huawei has a running number.

04:03:05 23   But our -- our Slide No. 5 -- Verizon's Slide No.

04:03:07 24   5 shows Claim 1. You can see in the extracting step,

04:03:11 25   Limitation No. 2, you're extracting information of the

04:03:15   1   first time stamp. And then in -- in the blue highlight,

04:03:18   2   it's wherein the information reflects the round trip delay

04:03:20   3   of a network.

04:03:21   4   And then later on at the end of the same claim,

04:03:23   5   you actually do the actual measurement of that round trip

04:03:26   6   delay. You see where it says that the last -- the last

04:03:30   7   clause highlighted in green, wherein the second time stamp

04:03:32   8   is used to measure the round trip delay.

04:03:36   9   So it's clear that the word "reflecting" doesn't

04:03:39   10 mean it is the round trip delay because the round trip

04:03:42   11 delay is not measured until the last step.

04:03:45   12   So the word "reflect" was used in these claims to

04:03:48   13 have a very broad meaning, and it was intentionally broad

04:03:51   14 to cover the various embodiments that are described within

04:03:55   15 the specification.

04:03:56   16   And the following slides -- Verizon Slide 6, 7,

04:04:01   17 and 8 go into the various different ways that the round

04:04:05   18 trip delay or the latency can be measured. The -- the

04:04:09   19 flowcharts are shown in the patents in Figures 6 and 7.

04:04:13   20   But there's nothing superfluous. I think opposing

04:04:16   21 counsel said it would render the claims superfluous,

04:04:19   22 this -- this "reflect" term. If you look at the term again

04:04:23   23 on Verizon Slide 5, it's the first time stamp that has

04:04:28   24 information that reflects the round trip delay. The

04:04:30   25 measuring of the round trip delay is used based off a

04:04:33 1 second time stamp where we have it in green here. So

04:04:36 2 there's nothing superfluous. It's two different

04:04:39 3 limitations addressing two different time stamps.

04:04:42 4   THE COURT: Let me ask you this. How would you

04:04:43 5 respond on behalf of Verizon to a comment that says: In

04:04:48 6 one breath Verizon says how different it is from Edmison,

04:04:55 7 and then in the next breath seeks a claim construction that

04:04:58 8 covers that --

04:05:03 9   MR. MACK: Well, I -- I would agree that that

04:05:05 10 would be inappropriate, but that's not what's happening

04:05:07 11 here.

04:05:07 12   In Edmison, as I explained, and if you look at our

04:05:11 13 Slide -- Verizon Slide No. 10 --

04:05:13 14   THE COURT: Could you slow down just a little bit,

04:05:15 15 Mr. Mack?

04:05:16 16   MR. MACK: Sure.

04:05:17 17   THE COURT: Okay. Go ahead.

04:05:20 18   MR. MACK: If you could turn to Verizon's Slide

04:05:22 19 No. 10.

04:05:24 20   THE COURT: I have it.

04:05:25 21   MR. MACK: There's two paragraphs of disclosure

04:05:30 22 here from our expert, Dr. Min, who analyzed the Edmison

04:05:35 23 reference and the file history. And he explains here why

04:05:37 24 the claimed invention is actually quite dissimilar from

04:05:40 25 Edmison.

04:05:43 1   And even if you look -- and he explains in

04:05:46 2 Paragraph 73 why Edmison does not disclose a time -- a

04:05:51 3 first time stamp that includes information reflecting a

04:05:54 4 round trip delay. And that's because in Edmison, the time

04:05:59 5 stamp was overwritten when it was received at the

04:06:01 6 destination. And then a new time stamp, the new current

04:06:05 7 time was inserted into that time stamp and sent back.

04:06:10 8   So Edmison would not read on our alternative

04:06:13 9 construction. But, again, it's Verizon's position that

04:06:15 10 this -- this term doesn't need construction. It's plain

04:06:18 11 and ordinary meaning. And you would under -- a person of

04:06:21 12 ordinary skill in the art would understand what it means

04:06:22 13 for information to reflect the round trip delay. And that

04:06:26 14 can be, you know, a factual issue that the jury can decide

04:06:32 15 whether or not the -- you know, that the accused products

04:06:34 16 practice that limitation.

04:06:35 17   THE COURT: All right. Thank you.

04:06:38 18   Mr. Reich, do you have any follow-up on this

04:06:40 19 matter?

04:06:41 20   MR. REICH: Briefly, Your Honor.

04:06:42 21   So going back to the point about -- as you

04:06:47 22 mentioned, what would Verizon say on the response -- in one

04:06:51 23 breath, they say Edmison doesn't cover it.

04:06:54 24   I think, Your Honor, if you go and look at

04:06:56 25 Paragraph 63 of Edmison and additionally Paragraph 50 and

04:06:59 1 65, you will see that the argument that they're making on

04:07:03 2 Edmison is just wrong. The examiner rejected it. You can

04:07:07 3 see that.

04:07:10 4   On our Slide 103, they -- the examiner rejected it

04:07:14 5 after they made it. And it was only after that rejection

04:07:17 6 did they make these amendment to include this term.

04:07:21 7   And, again, I point to the information we have on

04:07:24 8 Slide 102 for the disclaimer where they said what was cited

04:07:29 9 is not met by this limitation.

04:07:31 10   That's all we have.

04:07:33 11   THE COURT: All right. Thank you, counsel.

04:07:34 12   Let's go next to the first time stamp is or was

04:07:45 13 inserted from Claims 1 and 12 and 6, 16, 26, 30, and 22 of

04:08:01 14 the '288 patent.

04:08:03 15   Let me hear from Huawei first here, please.

04:08:06 16   MR. REICH: Your Honor, somewhat similar to the

04:08:10 17 last term, what we have here is a file history that

04:08:14 18 ultimately there's a number of rejections and ends up with

04:08:17 19 a limitation. And what we see Verizon doing is now they're

04:08:21 20 trying to encompass what they added this limitation to get

04:08:24 21 around.

04:08:25 22   And I'm just going to cut to the chase because I

04:08:27 23 know Your Honor wants to know where's the clear and

04:08:31 24 unambiguous disclaimer that we're pointing to. And we go

04:08:34 25 through all the file history, but specifically -- excuse

04:08:38   1   me, Your Honor, go to Page 129 of -- of the Huawei

04:08:44   2   presentation.

04:08:44   3   It's on the right side of the citation that we

04:08:49   4   have, and where they say: In addition, the -- inserting

04:08:54   5   the first time stamp into the portion of the optical

04:08:58   6   overhead based on identifying the first time stamp and

04:09:00   7   inserting into the portion of the optical channel

04:09:06   8   overhead --

04:09:06   9   THE COURT: Slow down.

04:09:07 10   MR. REICH: Yeah, I -- I read that too quickly.

04:09:10 11   THE COURT: Yes, I'll agree with you about that.

04:09:12 12   MR. REICH: So what this is, is they're responding

04:09:16 13   to the examiner's rejection of the claims as they existed

04:09:22 14   in response to the Ofek prior art reference.

04:09:26 15   And what -- what they say is the inserting the

04:09:33 16   first time stamp into the portion of the optical channel

04:09:37 17   overhead based on identifying the first time stamp and

04:09:42 18   inserting into the portion of the optical channel overhead

04:09:47 19   that is assigned for the first time stamp -- I added the

04:09:52 20   "is" there, I think there's a typo -- disclosed by Ofek is

04:09:56 21   not the limitation that they added -- the limitation

04:09:59 22   they're trying to construe.

04:10:00 23   And so they are specifically saying inserting a

04:10:03 24   time stamp into the portion assigned for it is not what our

04:10:07 25   limitation means, but that is what they are trying to claim

04:10:10   1   it means under the guise of plain meaning in this case.

04:10:15   2   And what we have here -- on 125, you can see the

04:10:19   3   actual rejection, which is basically the examiner had found

04:10:23   4   that the Ofek reference met everything in the claim as it

04:10:28   5   existed, and that Ofek taught inserting the time stamp into

04:10:33   6   the portion of the overhead assigned to it. That's what

04:10:36   7   they said: No, our new amendment doesn't do that.

04:10:41   8   THE COURT: Let me ask you --

04:10:42   9   MR. REICH: And so --

04:10:43 10   THE COURT: Let me ask you this, Mr. Reich. Are

04:10:45 11   you arguing for some kind of preclusive effect or

04:10:51 12   prosecution history estoppel here that would render these

04:10:56 13   claims indefinite or invalid in some way? What -- what --

04:10:59 14   I guess let me ask the question a different way. What's

04:11:03 15   the real dispute here between Huawei and Verizon as you

04:11:06 16   understand it?

04:11:07 17   MR. REICH: In this term, Your Honor, the real

04:11:09 18   dispute is we just want this amend -- this term here to not

04:11:17 19   be able to be -- effectively be attempting to get a

04:11:21 20   negative limitation through our proposed construction.

04:11:24 21   But as our expert explained, the issue is this is

04:11:28 22   a fixed arrangement the way we see them reading it, the way

04:11:33 23   the Ofek reference taught, inserting into a portion that's

04:11:37 24   pre-assigned, that's assigned, as opposed to making a

04:11:39 25   determination that varies based various characteristics.

04:11:45   1   And so our proposal was to give the plain meaning.

04:11:48   2   We think it is the plain meaning of the term, but we have

04:11:50   3   an 02 Micro dispute here because what we see here is

04:11:54   4   Verizon is trying to read this claim on to what they had

04:12:00   5   claimed during prosecution.

04:12:02   6   THE COURT: How do -- how do we have an 02 Micro

04:12:04   7   dispute in the middle of claim construction?

04:12:06   8   MR. REICH: Well, we see that if we were to

04:12:08   9   continue down the path without construing the claim.

04:12:11 10   THE COURT: All right. Mr. Mack, what does

04:12:17 11   Verizon say here?

04:12:18 12   MR. MACK: Thank you, Your Honor.

04:12:18 13   If you -- if you could turn to Verizon's slides, I

04:12:24 14   wanted to start with Slide No. 30.

04:12:30 15   Do you -- you see here, this slide just has the

04:12:33 16   claim language on the left and then Huawei's proposed

04:12:36 17   constructions on the right. You'll see that what Huawei is

04:12:40 18   trying to do is they're trying to insert an active

04:12:45 19   determining step into -- the claim limitations vary

04:12:49 20   slightly -- there's a variance, but all of Huawei's

04:12:53 21   proposed constructions have a new determining step.

04:12:55 22   And I think you heard Mr. Hamad say in connection

04:12:58 23   with the '236 patent that that phrase "if" -- if something

04:13:03 24   needs to be increased or doesn't need to increase, that

04:13:03 25   that's not actually a determining step. And that's not in

04:13:06   1   the claim. And that's not a requirement of the claim.

04:13:08   2   So it's surprising that in the '236 patent,

04:13:14   3   they're arguing that there is no active determining step

04:13:14   4   when you have a -- an express condition in the claim, but

04:13:18   5   here they are arguing that there is an active determining

04:13:19   6   step when there's -- there's no -- the word "determining"

04:13:23   7   isn't even in the claim. All the claim says is that the

04:13:27   8   first time stamp was inserted on --

04:13:29   9   THE COURT: Could I ask you to slow down a little

04:13:31 10   bit, please? It's been a long day.

04:13:33 11   MR. MACK: Sure.

04:13:34 12   THE COURT: Thank you.

04:13:35 13   MR. MACK: All -- all that this claim has on the

04:13:38 14   left is that it says: Wherein the first time stamp was

04:13:43 15   inserted based on at least a characteristic of that time

04:13:48 16   stamp.

04:13:48 17   So what -- what you have Huawei doing is they're

04:13:53 18   trying to eliminate any embodiments where a -- a time stamp

04:13:57 19   is preassigned to a certain overhead portion. So if you

04:14:02 20   have -- if -- if you have a system that supports multiple

04:14:04 21   time stamps, Type A and Type B, so you're clearly looking

04:14:08 22   at the characteristics of the -- the time stamp, including

04:14:11 23   the type of the time stamp, if you insert Time Stamp Type A

04:14:17 24   into a fixed portion and then you insert Time Stamp Type B

04:14:21 25   into a different fixed portion, they're somehow saying that

04:14:24 1 you didn't insert the time stamp based on the

04:14:28 2 characteristic of the time stamp wherein that

04:14:29 3 characteristic is the type of time stamp. It doesn't

04:14:32 4 really make sense.

04:14:33 5   They're -- they're trying to import a new active

04:14:35 6 limiting step and read out express embodiments in the

04:14:40 7 specification. And that's -- if you look at Verizon's

04:14:44 8 Slide No. 32, we have a citation to the '288 patent, Column

04:14:51 9 6, starting at Line 31. The specification covers

04:14:55 10 embodiments where based on the type of time stamp, you're

04:15:00 11 going to be inserting it into a certain overhead portion,

04:15:04 12 and if you have a second type of time stamp, you'll insert

04:15:07 13 it into a different overhead portion.

04:15:09 14   The claim doesn't require you to actively

04:15:11 15 determine the type of time stamp each time you insert the

04:15:16 16 time stamp. That could have been done prior to these

04:15:19 17 steps, and then when you get to the steps of the claim, you

04:15:22 18 just -- you already know where to insert the time stamp

04:15:24 19 because you have two different types, and you're putting

04:15:27 20 one type into one location and the next type into a --

04:15:31 21 another location.

04:15:32 22   So if you go to the next slide, Slide 33, we think

04:15:36 23 this is doing exactly what the Accent Packaging case law

04:15:41 24 says you cannot do is that you're excluding a preferred

04:15:49 25 embodiment which is rarely, if ever, correct.

04:15:49 1   I wanted to just address the prosecution history

04:15:52 2   remarks from counsel. Again, I don't see any clear

04:15:53 3   disclaimer here. All I see is the applicant quoting the

04:15:58 4   claim language and saying that the Ofek reference does not

04:16:02 5   disclose that claim language.

04:16:05 6   If you turn to Verizon's Slide No. 34, here we

04:16:12 7   have call-outs from the file history. And the applicant on

04:16:19 8   the left says that Ofek -- the Office Action relies on Ofek

04:16:26 9   to disclose wherein the time stamp is inserted into a

04:16:30 10 portion of the overhead, and it's based on the

04:16:36 11 characteristics.

04:16:36 12   But then if you go on, it says that Ofek, in

04:16:39 13 combination with Edmison and Fujimori, failed -- failed to

04:16:47 14 disclose that limitation. And it's actually -- if you go

04:16:50 15 to the next -- the next page, the failure in Ofek is

04:16:53 16 actually related to the various overhead portions. It's

04:16:57 17 not a failure of the characteristic part of the claim

04:17:01 18 language.

04:17:02 19   The Ofek actually didn't describe the different

04:17:06 20 overheads, the -- the optical channel overhead, the optical

04:17:11 21 channel transporting unit overhead, the optical channel

04:17:15 22 data unit overhead, and the optical channel payload unit

04:17:17 23 overhead. So there were various overhead fields that are

04:17:22 24 recited in the claims that Ofek did not disclose.

04:17:26 25   So, again, we don't -- just like with the last

04:17:29 1 term, we don't see any clear prosecution history disclaimer

04:17:33 2 or clear disavowal anywhere in the file history. So we

04:17:37 3 think it would be improper to -- to limit this term in any

04:17:40 4 way.

04:17:42 5   THE COURT: All right. Mr. Reich just told me

04:17:43 6 that if I adopt your plain and ordinary meaning, as you've

04:17:47 7 urged, I am guaranteed to have an 02 Micro problem at the

04:17:53 8 most inopportune time later in this case. What's your

04:17:58 9 response to that?

04:17:59 10   MR. MACK: I don't believe that's true. I mean,

04:18:00 11 the claim language is clear. It's a wherein clause, and it

04:18:03 12 says: Wherein the time stamp was inserted based on a

04:18:09 13 characteristic of that time stamp.

04:18:11 14   I think the jury can take that language and apply

04:18:16 15 it. It's a factual dispute, and they can determine whether

04:18:20 16 or not Verizon's infringement read on the accused

04:18:22 17 products -- the accused products perform that limitation.

04:18:25 18   THE COURT: Well, I do think it's a little unusual

04:18:28 19 that on -- as I see it, every one of the Huawei patents,

04:18:35 20 Huawei told me plain and ordinary meaning was just fine,

04:18:41 21 and now when we get to the Verizon patents, if I adopt

04:18:46 22 plain and ordinary meaning, it would unavoidably set the

04:18:48 23 stage for an 02 Micro problem later in the case. I don't

04:18:51 24 know how it can be one way on one set of patents and not

04:18:55 25 another way on the other set of patents.

04:18:58 1   Let me ask Mr. Reich to address that a little

04:19:01 2 further for me.

04:19:02 3   MR. REICH: Yes. Yes, Your Honor.

04:19:03 4   I think the key here is the unique prosecution

04:19:05 5 history with respect to Verizon's patents. No one was

04:19:08 6 arguing prosecution disclaimer for the '236 patent that was

04:19:15 7 mentioned earlier.

04:19:16 8   With respect to some of the arguments that were

04:19:20 9 made, I'll start with the argument that was made about what

04:19:27 10 the specification specifically indicates. That was on

04:19:33 11 Verizon's Slide 32. We're not going to exclude any kind of

04:19:40 12 embodiments here. I think the key with this embodiment,

04:19:45 13 and our expert discussed it -- that is on our Slide 121.

04:19:49 14   The embodiment described in the specification is

04:19:54 15 one where the system is not a fixed system. It's not

04:19:58 16 assigning the time -- putting the time stamp or inserting

04:20:01 17 the time stamp into a place that's assigned for it. It's

04:20:05 18 making some sort of choice -- there's a choice. It varies,

04:20:12 19 and it depends on the characteristics. And I think that is

04:20:17 20 the key, and that is what was used to get around the prior

04:20:21 21 art.

04:20:21 22   If we go to their -- Verizon Slide 34, there's

04:20:29 23 various embodiments in the prosecution that are discussed,

04:20:32 24 but what's not on this slide is the key piece, which is on

04:20:36 25 our Slide 129 and discussed by our expert, which is the

04:20:42   1   '288 patent file history that I read, albeit fast, where

04:20:47   2   Verizon said: What our new addition to this claim means is

04:20:52   3   not inserting the time stamp into the portion of the

04:21:00   4   overhead that was assigned for it.

04:21:02   5   And so that is what we're trying to exclude

04:21:04   6   because Verizon excluded it. It's not that all -- all

04:21:11   7   particular patents should have things excluded. We think

04:21:13   8   the plain language excluded this. We think that's what the

04:21:19   9   based on is supposed to mean, a varied system, not a fixed

04:21:21 10   system, as our expert has talked about.

04:21:25 11   But they in prosecution made that argument to the

04:21:27 12   Patent Office, and so for them to, you know, come in -- we

04:21:31 13   have this dispute because -- and I have this as the last

04:21:36 14   slide, 131.

04:21:36 15   What they're reading this on, and I don't want to

04:21:38 16   get into infringement -- is a fixed system. PTP messages

04:21:45 17   is always done at the same spot. They always do. The

04:21:49 18   standard decided. It's not that the system, you know,

04:21:51 19   decided it.

04:21:52 20   And so it's a fixed arrangement they're trying to

04:21:54 21   read it on, and that is what was disclaimed in prosecution.

04:21:58 22   THE COURT: All right.

04:22:02 23   MR. MACK: Just briefly, if I may, Your Honor?

04:22:04 24   THE COURT: Very briefly.

04:22:05 25   MR. MACK: I -- I don't think Verizon disputes

04:22:09 1 that you have to take a characteristic of the time stamp

04:22:12 2 into account when you're inserting the time stamp. It's

04:22:16 3 just when -- when you have to take it into account.

04:22:20 4 There's nothing in the plain language of the claim that

04:22:22 5 prohibits a system designer or the person writing a

04:22:26 6 standard to fix -- to take into account the type of time

04:22:30 7 stamp when designing the standard, and if they know the

04:22:33 8 standard supports two different types of time stamps,

04:22:37 9 always insert Type A into a certain location and always

04:22:40 10 insert Type B into a second location, that clearly meets

04:22:44 11 the plain language of the claims.

04:22:45 12   What Huawei is trying to do is take this active

04:22:49 13 determining step and then add a temporal requirement that

04:22:52 14 you have to actually actively determine the characteristic

04:22:54 15 of the time stamp at the time when you're going to be

04:22:57 16 inserting it. It's just not anywhere in the claim. It's

04:23:00 17 not anywhere in the file history. It's not even close to

04:23:02 18 any arguments that were made to the examiner.

04:23:05 19   So we would -- that's why we think that Huawei's

04:23:09 20 interpretation is incorrect.

04:23:11 21   THE COURT: All right. Thank you, counsel, for

04:23:13 22 your argument on these terms. That appears --

04:23:19 23   MR. REICH: Your Honor, if I may?

04:23:20 24   THE COURT: Do you have something else?

04:23:22 25   MR. REICH: Sorry.

04:23:23   1   THE COURT: Do you have something else, Mr. Reich?

04:23:25   2   MR. REICH: Yes, Your Honor.   Just -- we did

04:23:27   3   propose an alternative.   It's -- it's cited on our Footnote

04:23:31   4   10 that's addressed on Page 31 of their slide deck.

04:23:36   5   To the extent the determining step gives the Court

04:23:39   6   any concern, the alternative would be to just read in a

04:23:42   7   negative limitation precisely in line with the disclaimer.

04:23:42   8   THE COURT: All right.

04:23:46   9   MR. REICH: Thank you, Your Honor.

04:23:46   10   THE COURT: Duly noted.

04:23:47   11   Okay.   Those appear to be the terms the parties

04:23:54   12   have agreed on for oral argument as a part of the claim

04:23:59   13   construction today, and these arguments are under

04:24:01   14   submission.

04:24:01   15   The Court is also aware in the parties' most

04:24:06   16   recent filing that the remaining disputed terms have been

04:24:10   17   stipulated to be decided on the papers.   However, I will

04:24:15   18   note that there's also a section of agreed terms that the

04:24:20   19   parties have agreed to.   There are -- there are a grouping

04:24:26   20   or there is a grouping, I should say, in Document 135 of

04:24:30   21   agreed terms, beginning on Page 8 of that filing.

04:24:35   22   I don't know if your most recent filing is going

04:24:39   23   to change that.   The copy of your most recent filing that I

04:24:46   24   have doesn't have a file mark on it.   It came in late this

04:24:50   25   morning before we began claim construction.

04:24:55 1   I just want to make sure and be clear on the

04:24:57 2 record as to what the parties' position are -- or parties'

04:25:02 3 positions are on these agreed and undisputed terms.

04:25:05 4   Are you gentlemen satisfied or is counsel present

04:25:09 5 satisfied that the filings on the docket with the Court

04:25:14 6 adequately memorialize and identify the agreements of the

04:25:18 7 parties on those claim terms that are not in dispute?

04:25:26 8   Do we need to do something -- I should ask it

04:25:30 9 another way. Do we need to do something to more clearly

04:25:33 10 memorialize your area of agreement, or are you satisfied

04:25:37 11 that that's covered adequately by what's on file?

04:25:41 12   MS. ACHARYA: Your Honor, the terms that we set

04:25:42 13 forth that are agreed that are on file are the agreed

04:25:46 14 terms. We'll also file what we just sent to the Court this

04:25:50 15 morning which shows just the terms that we're going to rely

04:25:51 16 on (audio drops) for, but there are no other terms that the

04:25:55 17 parties (audio drops).

04:25:56 18   THE COURT: Okay. So the -- the unfiled copy you

04:25:58 19 sent me this morning that I've used for the priority of the

04:26:01 20 arguments this afternoon doesn't change any of the agreed

04:26:05 21 terms that were set forth in Document 135 that was

04:26:08 22 previously filed with the clerk; is that correct, counsel?

04:26:11 23   MS. ACHARYA: That's correct.

04:26:12 24   THE COURT: Okay.

04:26:15 25   MR. REICH: That's correct.

04:26:15   1   THE COURT: Both sides agree to that?

04:26:17   2   MS. ACHARYA: Yes, Your Honor.

04:26:19   3   MR. REICH: Yes, Your Honor.

04:26:20   4   THE COURT: Okay. All right. As I say, these

04:26:22   5   disputed terms that I've heard argument on are under

04:26:25   6   submission. The remaining disputed terms that the parties

04:26:28   7   have agreed should be considered and decided on the papers

04:26:32   8   are also under submission.

04:26:35   9   I will endeavor to get the parties some written

04:26:38   10   guidance by way of a claim construction opinion as soon as

04:26:42   11   practical.

04:26:42   12   Are there other matters that we need to take up

04:26:44   13   today that the parties are aware of that the Court hasn't

04:26:49   14   otherwise covered?

04:26:50   15   Is Huawei aware of anything we've overlooked?

04:26:53   16   MS. ACHARYA: Not from Verizon, Your Honor.

04:26:55   17   THE COURT: How about from Huawei?

04:26:57   18   MR. REICH: Not from Huawei, Your Honor.

04:26:59   19   THE COURT: All right. Let me remind you, as I'm

04:27:03   20   sure you're aware, that the Court's current policy provides

04:27:07   21   for a window beginning upon the issuance of my claim

04:27:10   22   construction order for both sides to meet and confer and

04:27:13   23   advise the Court as to whether you believe, in light of the

04:27:17   24   claim construction opinion, that mediation would be

04:27:20   25   appropriate in the case, and if so, is there a potential

04:27:23   1   agreement between the parties on a mediator? I'll look for

04:27:27   2   that during the period immediately after my order issues.

04:27:32   3   I simply want to remind you of that so that you

04:27:34   4   can be sure to discharge your meet and confer obligations

04:27:38   5   under the Court's order.

04:27:39   6   All right. Having covered what's set for today

04:27:43   7   and the matters in dispute being under submission with the

04:27:46   8   Court, that will complete the claim construction portion of

04:27:49   9   today's hearing. Thank you for your attendance, counsel.

04:27:53 10   You are excused.

04:27:54 11   And the Court stands in recess.

          12   (Hearing concluded.)

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1   CERTIFICATION

2

3   I HEREBY CERTIFY that the foregoing is a true and

4 correct transcript from the stenographic notes of the

5 proceedings in the above-entitled matter to the best of my

6 ability.

7

8

9   /S/ Shelly Holmes   1/13/21
    SHELLY HOLMES, CSR, TCRR   Date
10 OFFICIAL REPORTER
    State of Texas No.: 7804
11 Expiration Date: 10/31/21

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